Supreme Court, U.S.
FILED
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No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX VOLUME I OF II

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PETITION FOR CERTIORARI FILED APRIL 1, 2004
CERTIORARI GRANTED JUNE 28, 2004

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United States Court of Appeals
Fifth Circuit

Thomas Joe MILLER-EL,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

No. 00-10784

Feb. 26, 2004

Appeal from the United States District Court
for the Northern District of Texas

[361 F.3d 849]

Before DAVIS, JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner brings this federal habeas corpus petition claiming, pursuant to *Batson* v. *Kentucky*, that the state trial court erred in finding that there was no purposeful discrimination in the selection of his jury. The district court denied Petitioner relief. The district court then denied a certificate of appealability ("COA"). Petitioner previously appealed to this court and we denied a COA. The Supreme Court reversed. We then granted COA and now address the merits of Petitioner's appeal.

BACKGROUND

On November 16, 1985, Thomas Jo Miller-El, his wife, and Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. During the robbery two employees, Doug Walker and Donald Hall, were ordered to lie on the floor, gagged with strips of fabric, and their hands and feet were bound. Miller-El

shot Walker twice in the [852] back and shot Hall in the side. Walker died from his wounds.

The state indicted Miller-El for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, Miller-El moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding blacks through the use of peremptory challenges. Miller-El's trial occurred before the Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, Miller-El sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding blacks from jury service. In a pretrial hearing held on March 12, 1986, Miller-El presented evidence in support of his motion. The trial judge, however, found "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." The state court then denied Miller-El's motion to strike the jury. Twelve days later, the jury found Miller-El guilty; and the trial court sentenced him to death.

Miller-El appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Supreme Court issued its opinion in *Batson* v. *Kentucky* and established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. 476 U.S. at 96-98, 106 S.Ct. 1712. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the

trial court must determine whether the defendant has shown purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712.

After acknowledging Miller-El had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El* v. *State*, 748 S.W.2d 459, 461 (Tex. Crim. App. 1988) (en banc). A post-trial hearing was held on May 10, 1988. There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial.

On January 13, 1989, the trial court concluded that Miller-El's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a *prima facie* case. Notwithstanding this conclusion, the state court determined that the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded. The court further found "no disparate prosecutorial examination of any of the venire [members] in question" and "that the primary reasons for the exercise of the challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty."

The Texas Court of Criminal Appeals denied Miller-El's appeal, and the Supreme Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Miller-El's state habeas proceedings fared no better, and he was [853] denied relief by the Texas Court of Criminal Appeals.

Miller-El filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[1] The federal magistrate judge who considered the merits of the *Bat-*

[1] Although Miller-El raised four issues, the petition has been narrowed down by the Supreme Court to only the jury selection claim premised on Batson. *See Miller-El* v. *Cockrell*, 537 U.S. 322, 329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

son claim recommended, in deference to the state court's acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that Miller-El be denied relief. The United States district court adopted the recommendation. Pursuant to 28 U.S.C. § 2253, Miller-El sought a COA from the district court, and the application was denied. Miller-El renewed his request to this Court, and we also denied a COA. Miller-El appealed to the Supreme Court and certiorari was granted. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002). In an opinion issued on February 25, 2003, the Supreme Court concluded based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus we had erred in not granting COA on Miller-El's *Batson* claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 347-48, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court remanded the case to this Court to determine whether Miller-El can "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Id.* at 348, 123 S.Ct. 1029. We granted COA for precisely that determination. *Miller-El* v. *Johnson*, 330 F.3d 690 (5th Cir.2003)(per curiam).

DISCUSSION

Claims of racial discrimination in jury selection are evaluated according to the framework established in *Batson* v. *Kentucky*, which requires a three-step analysis that shifts the burden of production between the parties. 476 U.S. at 96-98, 106 S.Ct. 1712. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if the requisite showing has been made, the burden shifts to the prosecution to provide a race-neutral explanation for striking the venire member in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, the defendant again has the burden, this time of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712. Under *Batson*, the ultimate burden of persuading the court that the state's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. *Id.* at 94 n. 18, 106 S.Ct. 1712 (citing *Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

In the present case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge. The only issue is Miller-El's disagreement with the trial court's determination at *Batson*'s third step that Miller-El had failed to show that the prosecution's reasons for exercising the challenged peremptory strikes were not credible and Miller-El had not demonstrated that purposeful discrimination **[854]** had occurred. The federal district court has already determined on habeas review that Miller-El has failed to show that the state court erred, and therefore is not entitled to habeas relief. Miller-El is now appealing this determination and COA has been granted. Therefore we now address the merits of Miller-El's appeal.

Under the current scheme for habeas review in federal court, which was substantially updated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(e)(1) requires that we "presum[e]" the state court's findings of fact "to be correct" unless Miller-El can rebut the presumption "by clear and convincing evidence."[2] As the Supreme Court has stated, the state court's finding at step three of Miller-El's *Batson* claim was a finding of fact

[2] The language of § 2254(e)(1) could not be clearer:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

and therefore subject to § 2254(e)(1)'s presumption of correctness. Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (citing *Hernandez* v. *New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), for the proposition that the determination made at step three of *Batson* is a " 'pure issue of fact' accorded significant deference").

We follow the lead of the Supreme Court in utilizing their decisions in *Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett* v. *Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), to guide our decision regarding the trial court's finding of no purposeful discrimination at step three in this *Batson* claim. These Supreme Court opinions state that the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness and credibility of the prosecutor's justification for his peremptory strike. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Hernandez*, 500 U.S. at 364-65, 111 S.Ct. 1859. Further, these cases, applying a standard of review even less deferential to the trial court's finding than we are required to apply under AEDPA, articulate that deference is necessary because the reviewing court is not as well positioned as the trial court to make credibility determinations, and once the trial court has made a credibility determination concerning the prosecutor's state of mind regarding the peremptory strikes, the step three determination under *Batson* has been decided. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (citing 28 U.S.C. § 2254(d)(8) and stating that the standard of review for a federal habeas claim required that the factual findings of the state court be presumed to be correct, and "may be set aside, absent procedural error, only if they are 'not fairly supported by the record' "); *Hernandez*, 500 U.S. at 366-67, 111 S.Ct. 1859 (applying, on direct review of a state court's factual findings, a "clearly erroneous" standard).

Miller-El argues that the state court's finding of the absence of purposeful discrimination was incorrect and the corresponding factual determinations were "objectively unreasonable" in light of the following four areas of evidence that

he claims were before the court. First, evidence of historical discrimination by the Dallas County District Attorney's office in the selection of juries. Second, the use of the "jury shuffle" tactic by the prosecution. Third, the alleged similarity **[855]** between non-black venire members who were not struck by the prosecution and six blacks who were. Fourth, evidence of so-called disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment.

First, Miller-El argues that he presented evidence of the Dallas County District Attorney's office "unofficial policy" of excluding blacks from jury service. Some of this evidence was first presented in the *Swain* hearing conducted by the trial court. When Miller-El's counsel attempted to reintroduce this historical evidence at the post-trial *Batson* hearing, the prosecution objected, arguing that even if accurate the evidence was irrelevant under *Batson*. The court admitted the evidence but reserved the right to give it no weight.

As the United States magistrate judge found, there was considerable evidence that the Dallas County District Attorney's office had an unofficial policy of excluding blacks from jury service and that this evidence was disturbing. The district court accepted this finding. But both the magistrate and district court noted that the historical evidence, however disturbing, is not determinative of whether there was purposeful discrimination in the selection of Miller-El's jury. We also note that the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable. The Supreme Court stated that proof "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection" is "relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in Miller-El's case. *Miller-El*, 537 U.S. at 347, 123 S.Ct. 1029. In this case, however,

the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

Second, Miller-El argues that the state court erred in not finding purposeful discrimination based on the use of the "jury shuffle" tactic by the prosecution. The record, however, clearly establishes that Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice. Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the *voir dire* process including the jury shuffles.

Third, Miller-El argues that there were similarities between non-black venire members who were not struck by the prosecution and six blacks who were. Miller-El maintains that the following six black venire members were victims of racially motivated peremptory strikes: Roderick **[856]** Bozeman, Billy Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy.

As to each of the black venire members Miller-El claims were the victims of racially motivated peremptory strikes, it is important to identify the prosecution's stated reasons for

exercising a peremptory challenge. Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident. Further, we can determine from the record that there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine.[3]

Roderick Bozeman stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person." If Bozeman thought there was a chance of rehabilitation, he did not think the death penalty was appropriate. He said that a "mentally disturbed" person and "a Manson type" were examples of someone who could not be rehabilitated. He said, however, that repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. Bozeman classified himself as the type of person who believed in the death penalty in principle, but who could not actually serve on a capital jury. He verified his inability to impose the death penalty by stating that even if the evidence compelled "yes" answers to the special issues posed to the jury at the punishment stage, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. The prosecution exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his belief that a pattern of violent conduct would not be sufficient to render a defendant deserving of death, and his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence.

Venire member Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury.

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[3] With the exception of black venire members Joe Warren and Paul Bailey, the prosecution set forth its race-neutral reasons for exercising the peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing the court took judicial notice of that prior testimony in the *voir dire* record. Miller-El has not based his claim on the prosecution striking Bailey.

However, after being informed that the possibility of rehabilitation would be a factor he would need to consider in assessing whether to impose the death penalty, Fields proclaimed that his religious belief was that no one was beyond rehabilitation. Fields stated, "I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." He further stated, "when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." Additionally, Fields indicated in his questionnaire and in response to questions by the prosecution that his brother had been incarcerated numerous times for drug offenses. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony.

Venire member Joe Warren answered questions during *voir dire* in a noncommital **[857]** manner and indicated ambivalence about the death penalty and his ability to impose it. He stated, "there are some cases where I would agree [with the death penalty], you know, and there are others that I don't." When the prosecution described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, he responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." When asked whether he could make a decision between a life sentence and a death sentence, Warren answered, "I think I could." When questioned about his ability to answer the future dangerousness special issue question, Warren responded, "I suppose there's always a chance, but there

again, you never know." Finally, Warren stated, "Well, it[']s just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice." The prosecution exercised a peremptory challenge to remove Warren. Miller-El's counsel did not object to the peremptory strike against Warren contemporaneous to the strike, therefore the prosecution did not give its race-neutral reasons at *voir dire*. At the *Batson* hearing, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during *voir dire* as the reasons for striking him. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the state had ten challenges remaining before exercising one to remove Warren. The prosecutor noted at the *Batson* hearing that an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly. In fact, the prosecutor on cross-examination at the *Batson* hearing admitted that he would have struck non-black jurors Sandra Hearn and Fernando Gutierrez, who also gave somewhat ambivalent answers regarding the death penalty, before Warren, had they come up earlier in the process.

Venire member Edwin Rand described capital punishment as a "touchy subject" during *voir dire* but did indicate on his questionnaire that he believed in the death penalty. In response to several alternative choices put to him by the prosecution, Rand described himself as a person who may or may not be able to impose the death penalty. He said, "Somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." The prosecution exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his lack of ability to serve on a capital jury.

Venire member Carrol Boggess indicated on her questionnaire that she had a moral, religious, or personal belief

that would prevent her from imposing the death penalty. During *voir dire* she stated, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." Later she stated, "I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence, is that correct?" When directly asked whether she could vote for a death sentence, she stated, "I've never been in that [858] situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." She continued by stating "whether or not I could actually go through with murder--with killing another person or taking another person's life, I just don't know. I'd have trouble with that." Boggess also indicated that she had testified as a defense witness at her nephew's theft trial. The prosecution exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's trial.

Venire member Wayman Kennedy stated on his questionnaire he believed in the death penalty "only in extreme cases." On *voir dire* he stated that he believed in the death penalty only for mass murders or cases involving mutilation. Kennedy stated he did not think a murder in the course of a robbery would necessitate the death penalty because "why wouldn't a life sentence be enough." Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could." The prosecution exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery, the crime Miller-El was accused of, his view that the death penalty was only appropriate in extreme cases, and his hesitancy in stating that he could answer the special issues according to the evidence.

Miller-El claims that three non-black venire members, Sandra Hearn, Marie Mazza, and Ronald Salsini, expressed views about the death penalty as ambivalent as those expressed by Bozeman, Fields, Warren, Rand, Boggess, and Kennedy, but the three non-black venire members were not struck by the prosecution. The record, especially the *voir dire* transcript, does not support this assertion.

Sandra Hearn stated in her jury questionnaire and on *voir dire* that she believed in the death penalty and could assess it in appropriate cases. She did express the belief that someone should not be sentenced to death on a first offense but if the person had committed any prior offense including robbery or some other criminal act of violence the death penalty would be appropriate. The evidence admitted at the punishment phase of Miller-El's trial indicated he had committed two previous armed robberies and one also involved a kidnaping. Hearn also stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse. She indicated that she had respect for law officers, that her father was a retired FBI agent, and that she had daily contact with police officers in her employment. Miller-El's counsel must have believed Hearn was a pro-prosecution venire member because he attempted to have her challenged for cause on numerous grounds, and when the trial judge found Hearn qualified, Miller-El's counsel requested an additional peremptory strike in order to remove her. In fact, on direct appeal Miller-El continued to argue that the trial court erred in denying his challenge for cause of Hearn, so it seems disingenuous to argue now that she was similarly situated to the black jurors who expressed reservations about imposing the death penalty.

Venire member Maria Mazza indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings on the death penalty at *voir dire*, she stated, "It's not an easy one and I feel that it depends upon the case, [859] the testimony.... It's kind of hard determining somebody's life, whether they live or die, but I

feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." Mazza served on Miller-El's jury.

Venire member Ronald Salsini stated he believed in the death penalty and that he could impose the death penalty. He did indicate imposing the death penalty would be difficult; however, he gave a hypothetical crime based on his personal experience as a bank teller that closely paralleled the crime Miller-El was charged with and stated that such a criminal act was deserving of the death penalty. The prosecution did not strike Salsini but Miller-El's counsel did.

Comparing the views expressed by Hearn, Mazza, and Salsini to the views expressed by the challenged black venire members, it is clear that Hearn, Mazza, and Salsini were not similarly situated for several reasons. First, ambivalence about the death penalty was not the sole reason for striking Bozeman, Fields, or Boggess. Second, Warren, Rand, and Kennedy were struck mainly because of ambivalence about the death penalty, but they each also expressed doubts about whether they personally could impose the death penalty even if the evidence indicated the death penalty was appropriate. This was not the case with Hearn, Mazza, and Salsini. Third, Warren refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it. Fourth, Kennedy stated the death penalty should be limited to extreme cases. Finally, Rand's ambivalence was less pronounced and more in line with the uncertainty expressed by Hearn and Mazza, although Rand still indicated he was uncertain as to whether he could impose the death penalty. Under our federal habeas standard of review, however, Miller-El has not shown by clear and convincing evidence that the trial court, who observed the *voir dire* process, erred in finding the prosecution's reason for striking Rand or the other black venire members credible.

Next, Miller-El claims non-black unchallenged venire members Hearn and Kevin Duke expressed views on rehabilitation similar to the views expressed by the black challenged venire members. Hearn's views have already been discussed. Duke expressed support for the death penalty and said he could impose it. Duke made comments concerning rehabilitation in the context of the availability of parole, not in the context of whether the death penalty was appropriate. Duke served on Miller-El's jury.

Again, the record does not support Miller-El's assertion. While the prosecution only cited views concerning rehabilitation as grounds for striking Bozeman and Fields, that was not the sole basis for exercising those strikes. As previously noted, Bozeman's and Fields' views on rehabilitation were much stronger than Hearn's and Duke's. Hearn and Duke were not similarly situated to any challenged black venire members.

Finally, Miller-El asserts that non-black venire members Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner were similarly situated to challenged black venire members who had family members with a criminal background. When Vickery was fifteen his sister had been arrested and served time in California. Vickery was a strong state juror and after unsuccessfully attempting to have him struck for cause, Miller-El used one of his preliminary strikes to remove Vickery. Davis' husband had been convicted of theft ten years earlier. Davis was a strong state juror and Miller-El attempted to have her struck for cause but was unsuccessful. Therefore, Miller-El used one of **[860]** his preliminary strikes to remove her. Nix's brother entered a guilty plea in a high profile white-collar crime case. Nix, who served as an office manager for her brother's construction company, had been named in several civil suits relating to the white-collar crime issues. Nix was a strong prosecution juror and Miller used one of his preliminary strikes to remove her from the panel. Weiner's ten-year-old son had once been arrested for shoplifting. Weiner served on Miller-El's jury.

Again, the record does not support Miller-El's *Batson* claim. The prosecution only cited a family member with criminal history as grounds for striking Boggess and Fields.

Furthermore, that was not the sole basis for striking either Boggess or Fields. In summary, Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members on whom he is basing his *Batson* claim. Therefore, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its preliminary challenges credible.

Fourth, Miller-El also argues that the prosecution posed different questions concerning the death penalty and the minimum allowable punishment to the venire members depending on the race of the venire member. The record, however, reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race. The prosecution used questioning to either ferret out a venire member's views on the death penalty or to establish a basis to disqualify venire members who had unfavorable views but were not subject to disqualification on those grounds.

One hundred and eight venire members survived the initial round of hardship excuses. The court excused three members for cause prior to *voir dire* and the parties agreed to remove thirty-nine others, including five blacks. Thus, a total of sixty-six venire members were subject to full *voir dire*, including fifty-one non-blacks and fifteen blacks.

The prosecution questioned all venire members concerning their views of the death penalty. A majority of the venire members were informed the state was seeking the death penalty and that affirmative answers to three questions submitted to the jury at the punishment phase would result in Miller-El being sentenced to death, and then asked about their views concerning the death penalty. Prosecutors did utilize a "graphic script" to describe an execution in detail to some venire members. Both black and non-black venire members who had expressed reservations never received the script. However, all black venire members given the graphic script had expressed some level of reservations about the death penalty in their juror questionnaires including Boggess, Kennedy, Bailey, Linda

ing Boggess, Kennedy, Bailey, Linda Baker, Troy Woods,[4] Janice Mackey, Anna Keaton, and Jeanette Butler.[5] Some of the non-black venire members questioned with the graphic script expressed reservations including Dominick Desinise and Clara Evans. Non-black venire member Vivian Sztybel did not express reservations about the death penalty yet still received the graphic **[861]** script. Sztybel was ultimately seated on Miller-El's jury.

Miller-El contends that there were ten black venire members who expressed reservations and seven of these venire members, who were ultimately peremptory challenged by the prosecution, got the script, while there were ten non-black venire members who expressed reservations but only two got the script. Miller-El argues this disparity proves purposeful discrimination and therefore the trial court erred. A review of precisely what the prosecution did in terms of *voir dire* questioning indicates the trial court, who observed the *voir dire* process, did not err in finding there was no purposeful discrimination.

The jury questionnaire asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" Venire members could circle "yes" or "no," and then they were asked to "[p]lease explain your answer." Question 58 allowed venire members to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?"

Presumably, the eight non-blacks who did not receive the graphic script, but Miller-El thinks should have, answered "no" to question 56 and answered to "yes" to ques-

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[4] Woods' questionnaire did not clearly indicate his views on the death penalty and thus he received the graphic script, but on *voir dire* he indicated that he fully supported the death penalty, the state believed him to be an excellent juror and he was in fact seated on Miller-El's jury.

[5] Jeanette Butler's juror questionnaire is not contained in the record, however, at *voir dire* she stated that she was unwilling to impose the death penalty. Butler was ultimately removed for cause.

tion 58. Questioning on *voir dire* also indicates there was no uncertainty as to the views of these eight non-black venire members. They were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors. In fact, of these eight, five were removed for cause because of their views on the death penalty, including John Nelson, Linda Berk, Gene Hinson, Sheila White, and Joyce Willard while one, Leta Girard, was removed by agreement of the parties. The two others also had strong views, making use of the graphic script unnecessary. Margaret Gibson did not believe in the death penalty and the state exercised a peremptory challenge to remove her. James Holtz believed the death penalty was appropriate only if a police officer or fireman was murdered and the state exercised a peremptory challenge to remove him.

The prosecution treated the black venire members no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. This included Bozeman, Fields, Warren, and Rand. The black venire members who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing a combination of uncertainty and philosophical opposition to the death penalty. Those venire members included Boggess, Kennedy, Baker, Woods, Mackey, Bailey, and Keaton.

In summary, sixteen venire members for whom questionnaire information is available, clearly indicated on the questionnaires their feelings on the death penalty, and fifteen of them did not receive the graphic script. The one who did receive the script was non-black venire member Sztybel. Eight venire members gave unclear answers and those eight venire members received the graphic script. The answers given, not race, accurately indicated whether a venire member got the graphic script, and this is confirmation of the prosecution's race-neutral rationale.

[862] The prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included offense of murder. Different questioning on the minimum sentence issue was used as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ what Miller-El argues is a "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic death penalty questioning.

Seven black venire members were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. These individuals included Rand, Kennedy, Bozeman, Warren, Baker, Boggess, and Fields.

According to Miller-El's argument the prosecution should have used the "manipulative" punishment script on Woods. But Woods gave answers indicating he would be an excellent state's juror and therefore the prosecution had no reason to attempt to have him removed. Had the prosecution sought to eliminate blacks because of race, the use of the "manipulative" script would have been deployed against Woods. But it was not, because the prosecution wanted Woods on the jury.

Likewise, there are no similarly situated non-black venire members who, under the prosecution's rationale, would have been questioned about minimum sentencing. This is true because unless a venire member indicated he would be a poor state's juror and would not otherwise be struck for cause or by agreement, there was no reason to use the "manipulative" script. Thus, of the ten non-black venire members who expressed opposition to the death penalty, eight were struck for cause or by agreement, meaning no "manipulative" script was necessary to get them removed.

Those struck included Desinise, Evans, Nelson, Berk, Hinson, White, Willard, and Girard. The other two non-black venire members Gibson and Holtz were both given the "manipulative" script and peremptorily struck.

In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred. Therefore, the district court correctly denied Miller-El habeas relief.

CONCLUSION

Having carefully reviewed the record in this case, the parties' respective briefing and arguments, and for the reasons set forth above, we affirm the decision of the district court in its denial of habeas relief to Miller-El because he has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination.

AFFIRMED.

Supreme Court of the United States

Thomas Joe MILLER-EL,
Petitioner,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division

No. 01-7662

Argued Oct. 16, 2002
Decided Feb. 25, 2003

[537 U.S. 322]

Justice KENNEDY delivered the opinion of the Court.

In this case we once again examine when a state prisoner can appeal the denial or dismissal of his petition for writ of habeas corpus. In 1986 two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury which tried petitioner Thomas Joe Miller-El. During the ensuing 17 years, petitioner has been unsuccessful in establishing, in either state or federal court, that his conviction and death sentence must be vacated because the jury selection procedures violated the Equal Protection Clause and our holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim now arises in a federal petition for writ of habeas corpus. The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153, of the United States Code, most recently amended in a substantial manner by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions.

The United States District Court for the Northern District of Texas, after reviewing the evidence before the state

trial court, determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Fifth Circuit, concluding there was insufficient merit to the case, denied a certificate of appealability **[327]** (COA) from the District Court's determination. The COA denial is the subject of our decision.

At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484, 120 S.Ct. 1595. Applying these principles to petitioner's application, we conclude a COA should have issued.

I

A

Petitioner, his wife Dorothy Miller-El, and one Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. They emptied the cash drawers and ordered two employees, Doug Walker and Donald Hall, to lie on the floor. Walker and Hall were gagged with strips of fabric, and their hands and feet were bound. Petitioner asked Flowers if he was going to kill

Walker and Hall. When Flowers hesitated or refused, **[328]** petitioner shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The State indicted petitioner for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, petitioner moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Petitioner's trial occurred before our decision in *Batson*, *supra*, and *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, petitioner sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing held on March 12, 1986, petitioner presented extensive evidence in support of his motion. The trial judge, however, found "no evidence ... that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." App. 813. The state court then denied petitioner's motion to strike the jury. *Ibid.* Twelve days later, the jury found petitioner guilty; and the trial court sentenced him to death.

Petitioner appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Court decided *Batson v. Kentucky* and established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. 476 U.S., at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court must determine **[329]** whether the defendant

has shown purposeful discrimination. *Id.*, at 98, 106 S.Ct. 1712.

After acknowledging petitioner had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El v. State*, 748 S.W.2d 459 (1988). A post-trial hearing was held on May 10, 1988 (a little over two years after petitioner's jury had been empaneled). There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial. App. 843-844.

On January 13, 1989, the trial court concluded that petitioner's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a prima facie case. App. 876. Notwithstanding this conclusion, the state court determined that the State would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each African-American excluded. The court further found "no disparate prosecutorial examination of any of the veniremen in question" and "that the primary reasons for the exercise of the challenges against each of the veniremen in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty." *Id.*, at 878. There was no discussion of petitioner's other evidence.

The Texas Court of Criminal Appeals denied petitioner's appeal, and we denied certiorari. *Miller-El v. Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Petitioner's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Petitioner filed a petition for writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. Although petitioner raised four issues, we concern ourselves here with only petitioner's jury selection claim premised on *Batson*. The Federal Magistrate Judge who considered the merits **[330]** was troubled by some of the evidence adduced in the state-court proceedings. He, nevertheless, recommended, in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that petitioner be denied relief. The United States District Court adopted the recommendation. Pursuant to § 2253, petitioner sought a COA from the District Court, and the application was denied. Petitioner renewed his request to the Court of Appeals for the Fifth Circuit, and it also denied the COA.

The Court of Appeals noted that, under controlling habeas principles, a COA will issue "'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Miller-El v. Johnson*, 261 F.3d 445, 449 (2001) (quoting 28 U.S.C. § 2253(c)(2)). Citing our decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the court reasoned that "[a] petitioner makes a 'substantial showing' when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." 261 F.3d, at 449. The Court of Appeals also interjected the requirements of 28 U.S.C. § 2254 into the COA determination: "As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1)." 261 F.3d, at 451.

Applying this framework to petitioner's COA application, the Court of Appeals concluded "that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary." *Id.*, at 452. As a consequence, the court "determined that the state court's adjudication neither resulted in a decision that **[331]** was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," *ibid.*; and it

denied petitioner's request for a COA. We granted certiorari. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002).

B

While a COA ruling is not the occasion for a ruling on the merit of petitioner's claim, our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures. Petitioner's evidence falls into two broad categories. First, he presented to the state trial court, at a pretrial *Swain* hearing, evidence relating to a pattern and practice of race discrimination in the *voir dire*. Second, two years later, he presented, to the same state court, evidence that directly related to the conduct of the prosecutors in his case. We discuss the latter first.

A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

These numbers, while relevant, are not petitioner's whole case. During voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential **[332]** juror for cause or by peremptory challenge. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

> "[I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death .. as the result of the verdict in this case if those three questions are answered yes." App. 215.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us ... your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?" *Id.*, at 506.

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. **[333]** *Huffman v. State*, 450 S.W. 2d 858, 861 (Tex. Crim. App. 1970), vacated in part, 408 U.S. 936, 92 S.Ct. 2860, 33 L.Ed.2d 753 (1972). This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of

36(94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only one out of eight (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

> "[Prosecutor]: Now, the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?
>
> "[Juror]: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> .....
>
> "[Prosecutor]: Again, we're not talking about self-defense or accident or insanity [1038] or killing in the heat of passion or anything like that. We're talking about the knowing--
>
> "[Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years." *Id.*, at 226-227.

Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about **[334]** the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex.Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2003). Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.

Next, we turn to the pattern and practice evidence adduced at petitioner's pretrial *Swain* hearing. Petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution's conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the **[335]** District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the Dis-

trict Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

Some testimony casts doubt on the State's claim that these practices had been discontinued before petitioner's trial. For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. *Id.*, at 788. Concerns over the exclusion of African-Americans by the District Attorney's Office were echoed by Dallas County's Chief Public Defender.

This evidence had been presented by petitioner, in support of his *Batson* claim, to the state and federal courts that denied him relief. It is against this background that we examine whether petitioner's case should be heard by the Court of Appeals.

II

A

As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and **[336]** obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ..." § 2253(c)(1). As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural

rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S., at 482, 120 S.Ct. 1595; *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). As the Court of Appeals observed in this case, § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, *supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based **[337]** on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances

where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383.

Our holding should not be misconstrued as directing that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("'AEDPA's purpose [is] to further the principles of comity, finality, and federalism' (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000))); *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'CONNOR, J.). The concept of a threshold, or gateway, test was not the innovation of AEDPA. Congress established a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process ...." *Barefoot, supra*, at 892, n. 3, 103 S.Ct. 3383. By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.

[338] A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot, supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy

§ 2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

B

Since Miller-El's claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* and reaffirmed in our later precedents. *E.g., Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Contrary to the state trial court's ruling on remand, the State now concedes that petitioner, Miller-El, satisfied step one: "[T]here is no dispute that Miller-El presented a prima facie claim" that prosecutors used their peremptory challenges to exclude venire members on the basis of race. Brief for Respondent 32. Petitioner, for his part, acknowledges that the State proceeded through step two by proffering facially race-neutral explanations for these strikes. Under *Batson*, then, the question remaining is step three: whether Miller-El "has carried his burden of proving purposeful discrimination." *Hernandez, supra*, at 359, 111 S.Ct. 1859.

As we confirmed in *Purkett v. Elem*, 514 U.S., at 768, 115 S.Ct. 1769, the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness **[339]** of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Ibid.* In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

In *Hernandez v. New York*, a plurality of the Court concluded that a state court's finding of the absence of discriminatory intent is "a pure issue of fact" accorded significant deference:

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. 1712. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)." 500 U.S., at 365, 111 S.Ct. 1859.

Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. "[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the **[340]** appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Id.*, at 367, 111 S.Ct. 1859.

In the context of direct review, therefore, we have noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be

overturned unless clearly erroneous. *Id.*, at 364, 111 S.Ct. 1859. A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2); see also *Williams*, 529 U.S., at 399, 120 S.Ct. 1495 (opinion of O'CONNOR, J.).

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (in action under Title VII of the Civil Rights Act of 1964, employee's prima facie case and evidence that employer's **[341]** race-neutral response was a pretext can support a finding of purposeful discrimination). Only after a COA is granted will a reviewing court determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary. At this stage, however, we only ask whether the District Court's application of AEDPA deference, as stated in § § 2254(d)(2) and (e)(1), to peti-

tioner's Batson claim was debatable amongst jurists of reason.

C

Applying these rules to Miller-El's application, we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable **[342]** requirement and applies to the granting of habeas relief rather than to the granting of a COA.

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court

need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. Slack, 529 U.S., at 481, 120 S.Ct. 1595; *Hohn*, 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

The case for debatability is not weakened when we examine the State's defense of the disparate treatment. The Court of Appeals held that "[t]he presumption of correctness is especially strong, where, as here, the trial court and state habeas court are one and the same." 261 F.3d, at 449. As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many **[343]** of their peremptory strikes, the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained

that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.

[344] We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning. 261 F.3d, at 452 ("The findings of the state court that there was no disparate questioning of the *Batson* jurors ... [is] fully supported by the record"). Petitioner argues that the prosecutors' sole purpose in using disparate questioning was to elicit responses from the African-American venire members that reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence, either of which justified for-cause challenges by the prosecution under the then applicable state law. This is more than a remote possibility. Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject

might have been the same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination. *Batson*, 476 U.S., at 97, 106 S.Ct. 1712 ("Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African-American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent **[345]** with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description.

There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 83 L.Ed. 757 (1939) ("'The fact that the testimony ... was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be

assumed that the State would have refrained from introducing it" (quoting *Norris v. Alabama*, 294 U.S. 587, 594-595, 55 S.Ct. 579, 79 L.Ed. 1074 (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex.Crim.App.1989). It follows, in our view, that a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire. *Batson*, *supra*, at 93, 106 S.Ct. 1712 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

[346] We agree with petitioner that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past. App. 788 (noting that a prosecutor admitted to requesting a jury shuffle "because a predominant number of the first six, eight or ten jurors were blacks"). Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection.

Finally, in our threshold examination, we accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. Evidence presented at the *Swain* hearing indicates that African-Americans almost categorically were excluded from jury service. *Batson*, *supra*, at 94, 106 S.Ct. 1712 ("Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination' "); *Vasquez v. Hillery*, 474 U.S. 254, 259, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that 'chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more'" (quoting *Hill v. Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942))); *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954) ("But it taxes our credulity to say that mere chance resulted in there being **[347]** no members of this class among the over six thousand jurors called in the past 25 years"). Only the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing. Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.

In resolving the equal protection claim against petitioner, the state courts made no mention of either the jury shuffle or the historical record of purposeful discrimination. We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it. This failure, however, does not diminish its significance. Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. This was clear error, and the State declines to defend this particular ruling. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S., at 98, 106 S.Ct. 1712 (quoting Norris, 294 U.S., at 598, 55 S.Ct. 579).

[348] To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was "objectively unreasonable" in light of the record before the court. The State represents to us that petitioner will not be able to satisfy his burden. That may or may not be the case. It is not, however, the question before us. The COA inquiry asks only if the District Court's decision was debatable. Our threshold examination convinces us that it was.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion, but write separately for two reasons: First, to explain why I believe the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealability (COA) is in accord with the text of 28 U.S.C. § 2253(c). Second, to discuss some of the evidence on the State's side of the case--which, though inadequate (as the Court holds) to make the absence of a claimed violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), undebatable, still makes this, in my view, a very close case.

I

Many Court of Appeals decisions have denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits--without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. See, *e.g.*, *Kasi v. Angelone*, 300 F.3d 487 (C.A.4 2002); **[349]** *Wheat v. Johnson*, 238 F.3d 357 (C.A.5 2001).[1] The Court today disapproves this approach, which improperly resolves the merits of the appeal during the COA stage. Ante, at 1036, 1039-1040. Less clear from the Court's opinion, however, is why a "circuit justice or judge," in deciding whether to issue a COA, must "look *to the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason." *Ante*, at 1039 (emphasis added). How the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), so the AEDPA standard should seemingly have no role in the COA inquiry.

Section 2253(c)(2), however, provides that "[a] certificate of appealability *may issue . . . only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphasis added.) A "substantial showing" *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition. Nothing in the text of § 2253(c)(2) prohibits a circuit justice or judge from imposing additional re-

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[1] In what can be regarded as a logical development from the error of analyzing a request for a COA like a merits appeal, some courts have simply allowed merits appeals to be taken *without* a COA--in flat contravention of . See, *e.g.*, *Bates v. Lee*, 308 F.3d 411 (C.A.4 2002).

quirements, and one such additional requirement has been approved by this Court. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (holding that a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

The Court today imposes another additional requirement: A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his **[350]** constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 1039. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

II

In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA. The facts surrounding petitioner's *Batson* claims, when viewed in light of § 2254(e)(1)'s requirement that state-court factual determinations can be overcome only by clear and convincing evidence to the contrary, reveal this to be a close, rather than a clear, case for the granting of a COA.

Petitioner maintains that the following six African-American jurors were victims of racially motivated peremptory strikes: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carrol Boggess. As to each of them, the State proffered race-neutral explanations for its peremptory challenge. Five were challenged primarily because of their views on imposing the death penalty (**[351]** Rand, Kennedy, Bozeman, Warren, and Boggess), and one (Fields) was challenged because (among other reasons) his brother had been convicted of drug offenses and served time in prison. By asserting race-neutral reasons for the challenges, the State satisfied step two of *Batson*. See *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Unless petitioner can make a substantial showing that (*i.e.*, a showing that reasonable jurists could debate whether) the State fraudulently recited these explanations as pretext for race discrimination, he has not satisfied the requirement of § 2253(c) (2). Moreover, because the state court entered a finding of fact that the prosecution's purported reasons for exercising its peremptory challenges were not pretextual, App. 878, a COA should not issue unless that finding can reasonably be thought to be contradicted by clear and convincing evidence. See § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). *Ante*, at 1039.

The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white veniremen similarly situated to the six aforementioned African-American veniremen. Although petitioner claims that two white veniremen, Sandra Hearn and Marie Mazza, expressed views about the death penalty as ambivalent as those expressed by Rand, Kennedy, Bozeman, Warren, and Boggess, the *voir dire* transcripts do not clearly bear that

out. Although Hearn initially stated that she thought the death penalty was inappropriate for first-time offenders, she also said, "I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty." App. 694. She further stated that someone who was an extreme child abuser deserved the death penalty, whether or not it was a first-time offense. Reply Brief for Petitioner 14a. Hearn also made pro-prosecution statements about her distaste for criminal **[352]** defendants' use of psychiatric testimony to establish incompetency. *Id.*, at 17a. As for Mazza, her stated views on the death penalty were as follows: "It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." App. 519.

Compare those statements with the sentiments expressed by the challenged African-American veniremen. Kennedy supported the death penalty only in cases of mass murder. "Normally I wouldn't say on just the average murder case--I would say no, not the death sentence." *Id.*, at 216. Bozeman supported the death penalty only "if there's no possible way to rehabilitate a person ... I would say somebody mentally disturbed or something like that or say a Manson type or something like that." *Id.*, at 79. When asked by the prosecutors whether repeated criminal violent conduct would indicate that a person was beyond rehabilitation, Bozeman replied, "No, not really." *Ibid.* Warren refused to give any clear answer regarding his views on the death penalty despite numerous questions from the prosecutors. *Id.*, at 139-140 ("Well, there again, it goes back to the situation, you know, sometimes",; *id.*, at 140. When asked whether the death penalty accomplishes anything, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't [sic]. Sometimes you have mixed feelings about things like that." *Ibid.* When asked, "What do you think it accomplishes when you feel it does?," Warren replied, "I don't know." *Ibid.* Boggess referred to the death penalty as "murder," *id.*, at 197, and said, "whether or not I could actually go through with murder--with killing another

person or taking another person's life, I just don't know. I'd have trouble with that," *ibid.* Rand is a closer case. His most ambivalent statement was "Can I do this? You know, right now I say I can, but tomorrow I might not." *Id.*, at 161 (internal quotation marks omitted). Later on **[353]** Rand did say that he could impose the death penalty as a juror. *Id.*, at 162-164. But Hearn and Mazza (the white jurors who were seated) also said that they could sit on a jury that imposed the death penalty. At most, petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza. That perhaps would have been enough to permit the state trial court, deciding the issue *de novo* after observing the demeanor of the prosecutors and the disputed jurors, to find a *Batson* violation. But in a federal habeas case, where a state court has previously entered factfindings that the six African-American jurors were not challenged because of their race, petitioner must provide "clear and convincing evidence" that the state court erred, and, when requesting a COA, must demonstrate that jurists of reason could debate whether this standard was satisfied. *Ante*, at 1039.

Fields, the sixth African-American venireman who petitioner claims was challenged because of his race, supported capital punishment. However, his brother had several drug convictions and had served time in prison. App. 124. Warren and Boggess, two of the African-American veniremen previously discussed, also had relatives with criminal convictions--Warren's brother had been convicted of fraud in relation to food stamps, *id.*, at 153, and Boggess had testified as a defense witness at her nephew's trial for theft, *id.*, at 211, and reported in her questionnaire that some of her cousins had problems with the law, Joint Lodging 43. Of the four white veniremen who petitioner claims also had relatives with criminal histories and therefore "should have been struck" by the prosecution--three (Noad Vickery, Cheryl Davis, and Chatta Nix) were actually so pro-prosecution that *they were struck by the petitioner*. *Id.*, at 111. The fourth, Joan Weiner, had a son who had shoplifted at the age

of 10. App. 511. That is hardly comparable to Fields's situation, and Weiner was a strong State's juror for **[354]** other reasons: She had relatives who worked in law enforcement, *id.*, at 510, and her support for the death penalty was clear and unequivocal, id., at 506, 511.

For the above reasons, my conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible.

With these observations, I join the Court's opinion.

Justice THOMAS, dissenting.

Unpersuaded by petitioner's claims, the state trial court found that "there was no purposeful discrimination by the prosecut[ion] in the use of ... peremptory strikes," App. 878. This finding established that petitioner had failed to carry his burden at step three of the inquiry set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Title 28 U.S.C. § 2254(e)(1) requires that a federal habeas court "presum[e]" the state court's findings of fact "to be correct" unless petitioner can rebut the presumption "by clear and convincing evidence." The majority decides, without explanation, to ignore § 2254(e)(1)'s explicit command. I cannot. Because petitioner has not shown, by clear and convincing evidence, that any peremptory strikes of black veniremen were exercised because of race, he does not merit a certificate of appealability (COA). I respectfully dissent.

I

A

The Court agrees, *ante*, at 1042, that the state court's finding at step three of *Batson* is a finding of fact ordinarily subject to § 2254(e)(1)'s presumption of correctness:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual **[355]** issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

However, the Court implicitly rejects the obvious conclusion that the COA determination under § 2253(c) is part of a "proceeding instituted by an application for a writ of habeas corpus." Instead of presuming the state court's fact-findings to be correct, as § 2254(e)(1) requires, the Court holds that petitioner need only show that reasonable jurists could disagree as to whether he can provide clear and convincing evidence that the finding was erroneous. *Ante*, at 1041.

The Court's main justification for this conclusion is supposed fidelity to *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See *ante*, at 1040 ("'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong' " (quoting *Slack*, *supra*, at 484, 120 S.Ct. 1595)). But neither *Slack* nor any other decision of this Court addressing the COA procedure has ever considered a "constitutional claim" that turns entirely on issues of fact. In these circumstances, it is the text of § 2254(e)(1) that governs.

Unlike the majority, I begin with the plain text of the statute that instructs federal courts how to treat state-court findings of fact. At issue is what constitutes a "proceeding" for purposes of § 2254(e)(1). The word, "proceeding," means "[t]he regular and orderly progression of a lawsuit, including *all acts and events between* the time of commencement and the entry of judgment." Black's Law Dictionary 1221 (7th ed.1999) (emphasis added). The COA, "standing alone, ... does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a 'party' on the other side. It is nothing more than a request for permission to seek review." *Hohn v. United States*, 524 U.S. 236, 256, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (SCALIA, J., dissenting).

[356] I agree with the majority that the existence of a COA is a jurisdictional prerequisite to the merits appeal.

Ante, at 1039. However, the Court takes a wrong turn when it implies that the merits appeal is part of the habeas process (or "proceeding") but the COA determination somehow is not. Overwhelming authority (including the majority opinion) confirms that § 2254(e)(1) applies to the merits appeal. See *ante*, at 1042; *Weaver v. Bowersox*, 241 F.3d 1024, 1030 (C.A.8 2001); *Putman v. Head*, 268 F.3d 1223, 1241 (C.A.11 2001); *Johnson v. Gibson*, 254 F.3d 1155, 1160 (C.A.10 2001); *Francis S. v. Stone*, 221 F.3d 100, 114-115 (C.A.2 2000); *Weeks v. Snyder*, 219 F.3d 245, 258 (C.A.3 2000); *Mueller v. Angelone*, 181 F.3d 557, 575 (C.A.4 1999); *Ashford v. Gilmore*, 167 F.3d 1130, 1131 (C.A.7 1999); cf. *Sumner v. Mata*, 449 U.S. 539, 546-547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (pre-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) factual deference provision with virtually identical language applies to merits appeal). The COA determination should be treated no differently, because § 2254(e)(1) draws no distinction between the merits appeal and the COA. The Court's silent conclusion to the contrary is simply illogical. The COA's status as the jurisdictional prerequisite for the merits appeal requires that both the COA determination *and* the merits appeal be considered a part of the same "proceeding."

The Court's rejection of this conclusion also conflicts with pre-AEDPA practice. Prior to AEDPA, access to a merits appeal in federal habeas corpus proceedings was governed by a mechanism similar to the COA, known as a certificate of probable cause, or CPC. See *Slack*, *supra*, at 480, 120 S.Ct. 1595. There was also a standard of factual deference similar to, though weaker than, the standard in § 2254(e)(1). See 28 U.S.C. § 2254(d) (1994 ed.).[2] Under

[2] The pre-AEDPA standard of factual deference provided:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit [enumerated exceptions omitted].... And in an evidentiary hearing ... the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

these provisions (indistinguishable **[357]** from AEDPA's for these purposes), courts concluded that § 2254(e)(1)'s predecessor applied directly to the CPC proceeding, without any filtering through the "debatability" standard the Court has used in both the CPC and COA contexts. See, *e.g.*, *Barnard v. Collins*, 13 F.3d 871, 876-877 (C.A.5 1994); *Cordova v. Collins*, 953 F.2d 167, 169 (C.A.5 1992). These cases support the straightforward notion that § 2254(e)(1), like its predecessor did with respect to CPC proceedings, applies directly to the COA proceeding.

The Court's decision in *Hohn*, *supra*, which holds that the COA determination constitutes a "case" in the court of appeals for purposes of this Court's jurisdiction under 28 U.S.C. § 1254, is not to the contrary. *Hohn* does not hold, nor does its logic require, that the COA determination be regarded as separate from the rest of the habeas proceeding. In fact, *Hohn* rejected the proposition that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits (3)27." 524 U.S., at 246, 118 S.Ct. 1969 (emphasis added). Indeed, *Hohn* analogized the COA to the filing of a notice of appeal, *id.*, at 247, 118 S.Ct. 1969, which in the civil context all would consider to be part of the same "proceeding" ("instituted by" a complaint) as the trial and merits appeal.

B

The Court also errs, albeit in dicta, when it implies that delayed state factfinding--here the two years between *voir dire* and the post-trial *Batson* hearing[3]--is an excuse for **[358]** weakened factual deference. *Ante*, at 1042. Even putting aside the fact that an appellate court on direct review should (and would) still give heavy deference to 2-year-old

[3] Not all the factfinding was so hindered. Prosecutors gave reasons for 2 of the 10 strikes of black veniremen at the post-trial *Batson* hearing. One of those, Joe Warren, is at issue here. App. 856-860.

credibility findings,[4] this reasoning is in tension with the plain text of § 2254(e)(1) and ignores changes wrought by AEDPA to the role of federal courts on collateral review.

Unlike an appellate court's review of district court findings of fact for clear error, § 2254(e)(1) establishes a presumption of correctness. It requires that the federal habeas court assume the state court that entered the findings was the best placed factfinder with the most complete record and *only then* ask whether the petitioner can refute that factual finding by clear and convincing evidence. Procedural imperfections ordinarily will not affect this presumption; thus, it does not matter whether the state judge made his decision two years late or with a less-than-perfect record. Admittedly these conditions might increase the *odds* that a habeas applicant could locate helpful evidence, but to "presume" facts "correct" means a court cannot allow a habeas applicant to evade § 2254(e)(1) by attacking the process employed by the state *factfinder* rather than the actual *factfindings*.

This reading is confirmed by the changes worked by AEDPA. Section 2254(e)(1) does not, as its predecessor did, create exceptions to factual deference for procedural infirmities. For example, prior to AEDPA, a federal habeas court **[359]** would not defer to state-court determinations of fact if " the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2) (1994 ed.), "the material facts were not adequately developed at the State court hearing," § 2254(d)(3),

[4] I am puzzled by the majority's willingness to hold against *respondent* the failure of prosecutors to testify at the post-trial *Batson* hearing. *Petitioner* could easily have requested that the reasons for the allegedly unconstitutional peremptory strikes be given again, and did not. The attorney representing the State at the post-trial *Batson* hearing made certain that both trial prosecutors were present to reiterate the reasons they gave in the record for striking the challenged black veniremen. App. 865. Petitioner's counsel explicitly refused the opportunity to do so when it was offered. *Ibid.* Furthermore, I fail to understand why a move that resulted in a more efficient hearing without redundant testimony should redound to the benefit of petitioner, who bears the burden of proof in this federal habeas corpus proceeding.

or "the applicant did not receive a full, fair, and adequate hearing," § 2254(d)(6). The removal of these exceptions forecloses the use of marginal procedural complaints--such as a delay between *voir dire* and a *Batson* hearing--to determine whether or "how much" a federal habeas court will defer to state-court factfinding.

Section 2254(e)(1) simply cannot be read to contain an implied sliding scale of deference. I do not understand the Court to disagree with this view, however, as its dicta does not actually purport to interpret the text of § 2254(e)(1).[5]

II

Because § 2254(e)(1) supplies the governing legal standard, petitioner must provide "clear and convincing" evidence of purposeful discrimination in order to obtain a COA. Petitioner's constitutional claim under *Batson* turns on this fact and "reasonable jurists could debate," *ante*, at 1039 (internal **[360]** quotation marks omitted), whether a Batson violation occurred only if petitioner first meets his burden under § 2254(e)(1). And the simple truth is that petitioner has not presented anything remotely resembling "clear and convincing" evidence of purposeful discrimination.

[5] I do, however, agree with the majority that the Court's decisions in *Hernandez v. New York*, 500 U.S.,352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S.765, 115 S.Ct. 1769, 131 .Ed.2d 834 (1995) *(per curiam)*, can be helpful in guiding a federal habeas court deciding a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For instance, both cases confirm that *Batson* step three turns on an evaluation of the prosecutor's proffered race-neutral justifications for the peremptory challenges at issue. *Purkett*, *supra* at 768-769, 115 S.Ct. 1769; *Hernandez*, 500 U.S., at 364-365, 111 S.Ct. 1859 (plurality opinion); *id.*, at 372, 111 S.Ct. 1859 (O'CONNOR, J., concurring in judgment); see also *Batson*, *supra* Additionally, because *Hernandez's* clear error standard is less demanding of a criminal defendant than is of a habeas applicant, a federal habeas court can deny relief on § 2254(e)(1) grounds if it determines it would do so when reviewing the same facts for clear error. Cf. *Marshall v. Lonberger*, 459 U.S. 422, 434-435, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("We greatly doubt that Congress ... intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself ").

A

The evidence amassed by petitioner can be grouped into four categories: (1) evidence of historical discrimination by the Dallas District Attorney's office in the selection of juries; (2) the use of the "jury shuffle" tactic by the prosecution; (3) the alleged similarity between white veniremen who were not struck by the prosecution and six blacks who were: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carroll Boggess; and (4) evidence of so-called disparate questioning with respect to veniremen's views on the death penalty and their ability to impose the minimum punishment.

The "historical" evidence is entirely circumstantial, so much so that the majority can only bring itself to say it "casts doubt on the State's claim that [discriminatory] practices had been discontinued before petitioner's trial." *Ante*, at 1038. And the evidence that the prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did.[6] Ultimately, these two categories of evidence do very little for petitioner, because they do not address the genuineness of prosecutors' proffered race-neutral reasons for making the peremptory strikes of these particular jurors.

In short, the reasons that Justice SCALIA finds this to be a "close case," *ante*, at 1045 (concurring opinion), are reasons that, under the correct reading of § 2254(e)(1), it is a *losing* **[361]** case. I write further to explore two arguments advanced by petitioner that the Court deemed helpful in establishing petitioner's "debatable" entitlement to re-lief, apparently because the majority's "debatability" inquiry requires a less-thorough review of the record and a more permissive attitude toward a COA movant's representations.

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[6] Petitioner shuffled the jury five times; the prosecution did so only three times. Brief for Respondent 21.

B

As noted, petitioner argues the prosecution struck six blacks--Rand, Kennedy, Bozeman, Fields, Warren, and Boggess--who were similarly situated to unstruck whites. I see no need to repeat Justice SCALIA's dissection of petitioner's tales of white veniremen as ambivalent about the death penalty as Kennedy, Bozeman, Warren, and Boggess. *Ante*, at 1046-1048 (concurring opinion). However, the majority's cursory remark that "three of the State's proffered race-neutral rationales for striking [black] jurors pertained *just as well to some white jurors who were not challenged and who did serve on the jury*," *ante*, at 1043 (emphasis added), is flatly incorrect and deserves some discussion.

For the three challenged peremptory strikes used on Fields, Warren, and Boggess, petitioner has not even correctly alleged the existence of "similarly situated" white veniremen. The majority's discussion of this subject is misleading, stating that "prosecutors explained that their peremptory challenges against six [black] potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the [veniremens'] own family history of criminality." *Ibid.* The implication is that for each of the six challenged veniremen, the prosecution gave all three reasons as justifications for the use of a peremptory strike. To clarify: Rand, Kennedy, Bozeman, Warren, and Boggess were struck for ambivalence about the death penalty. Fields, Warren, and Boggess were struck for having family members **[362]** with criminal histories. Bozeman and Fields were struck for making prodefense remarks about rehabilitation.

Simple deduction, and an analysis of petitioner's contentions that includes the *names* of these allegedly similar white veniremen, compare *ibid.*, reveals that petitioner has unearthed no white venireman who, like Warren and Boggess, was *both* ambivalent about the death penalty *and* re-

lated to individuals who had previous brushes with the law.[7] Petitioner also produces no white venireman who, like Fields, expressed prodefense views on rehabilitation and had a family member with a criminal history.[8] "Similarly situated" **[363]** does not mean matching any one of several reasons the prosecution gave for striking a potential juror--it means matching all of them.

This leaves Rand, Kennedy, and Bozeman.[9] Petitioner alleges that white jurors Hearn and Mazza were as ambiva-

[7] Petitioner directs the Court to white veniremen Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner as having family members with criminal histories, but points to white veniremen Sandra Hearn and Marie Mazza as equally ambivalent about the death penalty. Brief for Petitioner 22. Of course, as Justice SCALIA demonstrates, Hearn and Mazza were *not* ambivalent about the death penalty. *Ante*, at 1047 (concurring opinion).

[8] Again petitioner points to Vickery, Davis, Nix, and Weiner for similar family histories. Justice SCALIA has shown that none of these four were in fact similarly situated to Fields with respect to this justification. *Ante*, at 1048 (concurring opinion). Petitioner also alleges that Hearn made prodefense remarks about rehabilitation similar to those made by Fields. Again, no white venireman even allegedly fits *both* reasons given for striking Fields. Furthermore, even if Fields had only been struck for his views on rehabilitation, those views were in no way equivalent to those expressed by Hearn. Fields answered "yes" to the question whether he believed that "everyone can be rehabilitated." App. 118. Fields went on to say that "[i]t may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." *Ibid.* In contrast, Hearn stated that she "believe[d] in the death penalty if a criminal cannot be rehabilitated." *Id.*, at 694.

Petitioner tries to muddy the waters by pointing out that Fields was, in other respects, a good State's juror because he supported the death penalty. Brief for Petitioner 24-25. However, that does not change the fact that Fields said that everyone could be rehabilitated (and thus might have been swayed by a penitent defendant's testimony) and Hearn insisted that some people could not be rehabilitated. In analyzing *Batson* claims the focus should not be on the "*reasonableness* of the asserted nonracial motive ... [but] rather [on] the *genuineness* of the motive." *Purkett*, 514 U.S., at 769, 115 S.Ct. 1769 (emphasis in original).

[9] The prosecution's stated reasons for striking Bozeman were that he was ambivalent about the death penalty and that he made prodefense

lent about the death penalty as these three struck black veniremen. Justice SCALIA has adequately demonstrated that this is absurd with respect to Kennedy and Bozeman, but I agree that petitioner makes a slightly better case with Rand. Ante, at 1048 (concurring opinion). However, since the burden is on petitioner to show, by clear and convincing evidence, that Rand was struck because of his race, I find this sliver of evidence, even when combined with petitioner's circumstantial evidence, insufficient to rebut § 2254(e)(1)'s presumption.

C

Petitioner's accounts of "disparate questioning" also amount to little of substance. Petitioner argues that the prosecution posed different questions at *voir dire* depending on the race of the venireman on two subjects: the death penalty and the minimum punishment allowed under law. Neither accusation can withstand a careful examination of the full record or help petitioner assemble the requisite clear and convincing evidence.

[364] 1

Respondent counters petitioner's complaints about the so-called "graphic formulation" or "script" by arguing that this depiction was used only with those potential jurors who "expressed reservations about the death penalty in their juror questionnaires." Brief for Respondent 17. The majority discounts this explanation, stating that "[t]his cannot be accepted without further inquiry." *Ante*, at 1043. Under my view, however, petitioner bears the burden of showing purposeful discrimination by clear and convincing evidence.

The Court's treatment of this issue focuses on the apparent disparity in treatment of 10 black veniremen and 10

remarks about rehabilitation. This is one case where the prosecution gave multiple reasons for a strike and petitioner actually correctly *alleged* the existence of a similarly situated white venireman, Hearn. Petitioner believes, albeit erroneously, see *ante*, at 1047-1048 (SCALIA, J., concurring), that Hearn expressed similar ambivalence about the death penalty *and* made prodefense remarks about rehabilitation.

white veniremen who were supposedly similar in their opposition to the death penalty. The majority notes that only 2 out of these 10 whites got the graphic description while 7 out of 10 blacks did. *Ante*, at 1043-1044. But the Court neglects to mention that the eight white veniremen who petitioner thinks should have received the graphic formulation, Reply Brief for Petitioner 15, n. 19, were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue. No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation. The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not.

The record demonstrates that six of these eight white veniremen were so opposed to the death penalty that they were stricken for cause without the need for the prosecution to spend a peremptory challenge. For example, John Nelson wrote on his questionnaire, "I believe that the State does not have the right to take anyone's life," Tr. of Voir Dire in No. F85-78668-NL (5th Crim. Dist. Ct., Dallas County, Tex.), p. 625 (hereinafter VDR) (internal quotation marks omitted), and testified flatly, "I would not be able to vote for the death **[365]** penalty."[10] *Id.*, at 614. Nelson was struck for cause. *Id.*, at 662-663. Linda Berk was "always" opposed to the death penalty, *id.*, at 1449, and felt so strongly on the subject that the prosecutor remarked upon her discomfort, after which she stated, "[y]ou're going to have to excuse me because I'm getting a little emotional, okay?" *Id.*, at 1445. Later, after she had begun crying, Berk was struck for cause. *Id.*, at 1478. Gene Hinson stated curtly, "I put on the form there that I didn't agree with it," *id.*, at 1648, and was struck for cause. Sheila White said, "I have always been

[10] Nelson was also a doctor and presumably did not need to have the lethal injection process described to him.

against ... the death penalty," *id.*, at 2056, and was struck for cause.

Even those two not struck for cause had firm views. Margaret Gibson said: "I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything," *id.*, at 485, and was struck by the prosecution with a peremptory strike. And James Holtz thought the death penalty appropriate only if a policeman or fireman was murdered. *Id.*, at 1021. I can apprehend simply no reason to fault the prosecution for failing to give a more graphic description of lethal injection to prospective jurors with such firm views against capital punishment.

I recognize that these *voir dire* statements only indirectly support respondent's explanation because the graphic script was typically given at the outset of *voir dire*--before the above quoted veniremen had the chance to give their stark answers. Nevertheless, all available evidence supports respondent's view that those who were unclear in their views on the death penalty *in their juror questionnaires* received the graphic formulation--and that those who were adamantly for *or against* the death penalty in their questionnaires did not.

The jury forms at issue asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?," offered potential jurors the **[366]** chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer." See, *e.g.*, Joint Lodging 44 (Boggess questionnaire). Question 58 allowed potential jurors to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Ibid.*

First, as already noted, the deeper and clearer opposition to the death penalty on the part of the eight whites who did not receive the graphic script (but petitioner thinks should have) indirectly supports respondent's contention that this opposition came out in their questionnaires (pre-

sumably by an answer of "no" to question 56 and an answer of "yes" to question 58). But this is not the only evidence supporting respondent's view. Hinson, a white venireman who did not receive the graphic formulation, stated during *voir dire* that he "put on the form there that [he] didn't agree with [the death penalty] for both moral and religious reasons." VDR 1648. Similarly, Nelson, a white venireman not receiving the graphic formulation, stated on his questionnaire, "I believe that the State does not have the right to take anyone's life." *Id.*, at 625 (internal quotation marks omitted). Fernando Gutierrez, a juror who received the graphic formulation, answered "yes" to question 56, but also "yes" to question 58, indicating he had "moral, religious, or personal beliefs" that would obstruct his voting for the death penalty despite the fact that he believed in it. Joint Lodging 205.

The prosecution treated the black veniremen no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs wouldn't prevent them from imposing a death sentence. See *id.*, at 12 (Bozeman), 20 (Fields), 28 (Warren), 36 **[367]** (Rand). The black veniremen who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing hesitation, rather than philosophical opposition, to the death penalty. Boggess answered "yes" to question 56 but also "yes" to question 58. *Id.*, at 44. Kennedy answered "yes" to question 56 but indicated that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." *Id.*, at 51. Troy Woods answered "no" to question 56, but also "no" to question 58, indicating he *did not* believe in the death penalty but would have no personal objection to imposing it. *Id.*, at 180. He wrote "that *[sic]* not punishment," in the space provided for question 56. *Ibid.* It happened that, while not completely clear about it in the questionnaire (and hence receiving the graphic formulation), Woods was an enthusiastic supporter of the death penalty, and he was, in fact, seated on petitioner's jury. Further confirming respondent's explanation, black veniremen Linda Baker, Janice Mackey, Paul Bailey, and Anna Keaton all gave unclear responses to questions 56 and 58 and all received the graphic formulation. See Tr. of Pretrial Hearings in No. F85-78660-NL (5th Crim. Dist. Ct., Dallas County, Tex.) (Def.Exh. 7).[11]

[368] To sum up, the correlation between questionnaire answers and the use of the graphic script is far stronger than any correlation with race. Sixteen veniremen clearly indicated on the questionnaires their feelings on the death penalty,[12] and 15 of them did not receive the graphic script.[13] Eight veniremen gave unclear answers and those eight veniremen got the graphic script.[14] In other words, for 23 out of 24, or 96%, of the veniremen for whom questionnaire information is available, the answers given accurately predict

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[11] Questions 56 and 58, and the responses thereto, are found on page 6 of each questionnaire. Baker did not circle "yes" or "no" in answering question 56, but wrote "[m]y strongest feeling is against the death penalty; *however, being aware of the overcrowding in jails and the number of murders[,] I would have to know the facts to make a decision....*" (Emphasis added.) Baker also did not answer question 58, writing "undecided" instead. Mackey answered question 56 "no," indicating she did not believe in the death penalty, and wrote "Thou Shall Not Kill" in the explanation space. She then proceeded to answer question 58 "no" as well. Bailey circled "yes" in answering question 56, but wrote in "NO" with a circle around it, along with such explanations as "yes for a major crime" and "[n]o *one* have [sic] the right to take *anothe [sic]* ones *[sic]* life." (Emphases in original.) He then circled "no" in answering question 58. Keaton circled "no," indicating she did not believe in the death penalty, when she answered question 56, writing "It's not for me to punished *[sic]* anyone." However she then circled "no" in answering question 58, indicating that she did not have any objection to imposing the death penalty.

[12] See VDR 1648 (Hinson), 625 (Nelson); Joint Lodging 12 (Bozeman), 20 (Fields), 28 (Warren), 36 (Rand), 125 (Mary Sumrow), 132 (Ronnie Long), 140 (Weiner), 148 (Mazza), 156 (Vivian Sztybel), 164 (Debra McDowell), 172 (Kevin Duke), 189 (Brenda Walsh), 197 (Filemon Zablan), 213 (Hearn).

[13] Sztybel received the graphic script. VDR 2828.

[14] Boggess, Kennedy, Baker, Mackey, Bailey, Keaton, Gutierrez, and Woods.

whether they got the graphic script.[15] Petitioner's theory that race determined whether a venireman got the graphic script produces a race-to-script correlation of only 74%--far worse.[16]

2

Petitioner fares no better with his allegation that the prosecution employed two different scripts on the basis of [369] race when asking questions about imposition of the minimum sentence. Indeed, this disparate questioning argument is as flawed as the last one. Respondent admits that the different questioning on minimum sentences was used as an effort to get veniremen the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ the "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic formulation.

Seven black veniremen were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. Rand, Kennedy, Bozeman, Warren, and Boggess' views on the death penalty have all been exhaustively discussed. This leaves Baker and Fields. Baker's views on the death penalty were so clearly ambivalent that she is not even the subject

[15] This analysis considers Hinson and Nelson as being clearly opposed to the death penalty in their questionnaires (answering question 56 "no" and question 58 "yes") and Kennedy as being ambiguous (though in fact he answered question 56 "yes" and 58 "no"). Even without these assumptions, 13 out of 15 veniremen who answered "yes" to question 56 and "no" to question 58--indicating clear support for the death penalty--did not receive the graphic script. And seven out of seven of those answering "no" and "no" or "yes" and "yes"--indicating ambiguous or mixed feelings about the death penalty--or not answering clearly at all received the graphic script. This yields an accuracy rate of 20 out of 22, or 91%.

[16] For whites, 10 out of 12 did not get the graphic script. For blacks, 7 out of 11 did get the graphic script. This means race predicted use of the graphic script only 74% of the time.

of petitioner's *Batson* challenge. And Fields' family history of criminality and views on rehabilitation, as earlier discussed, *supra*, at 1053, and n. 7, convinced the prosecution to use a peremptory strike.[17] Finally, petitioner's objection to the prosecution's decision not to use the "manipulative" punishment script on Woods, Reply Brief for Petitioner 17, n. 23, makes no sense. Woods gave answers indicating he would be an excellent State's juror--why would the prosecution have tried to eliminate him? Of course, if petitioner were correct that the prosecution sought to eliminate blacks then one might expect that all methods, including the use of the "manipulative" script, would have been deployed against Woods, who happened to also be black.

As with graphic questioning, respondent's explanation goes unrebutted by petitioner. Unless a venireman indicated he would be a poor State's juror (using the criteria that 370 respondent has identified here) *and would not otherwise be struck for cause or by agreement*, there was no reason to use the "manipulative" script. Thus, when petitioner points to the "State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty," *ibid.*, he ignores the fact that of the 10 whites who expressed opposition to the death penalty, 8 were struck for cause or by agreement, *meaning no "manipulative" script was necessary to get them removed.* The other two whites were both given the "manipulative" script and peremptorily struck,[18] just like Rand, Kennedy, Bozeman, Fields, Warren, Boggess, and Baker.

Quite simply, petitioner's arguments rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record. Far from rebutting § 2254(e)(1)'s presumption, petitioner has perhaps not even demonstrated that reasonable jurists could debate whether

[17] The prosecution in fact used peremptory strikes on all seven of these black veniremen.

[18] See Joint Lodging 110; VDR 502-511 (Gibson), 1046-1050 (Holtz).

he has provided the requisite evidence of purposeful discrimination--but that is the majority's inquiry, not mine. Because petitioner has not demonstrated by clear and convincing evidence that even one of the peremptory strikes at issue was the result of racial discrimination, I would affirm the denial of a COA.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[FILED 07/24/00]

00-10784

THOMAS JOE MILLER-EL,
Petitioner-Appellant,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/00	Death penalty case docketed. NOA filed by Appellant Thomas Joe Miller-El [00-10784] (mrw)
7/24/00	Criminal Justice Act 20 voucher issued to Andrew A Hammel for Appellant Thomas Joe Miller-El . (00-10784 (jar)
7/24/00	Criminal Justice Act 20 voucher issued to James William Marcus for Appellant Thomas Joe Miller-El . [00-10784] (jar)
8/4/00	Appearance form filed by Ann Kraatz for Appellee Gary L Johnson. [00-10784] (mrw)
8/7/00	Transcript order received from Appellant Thomas Joe Miller-El for Court Reporter Janet Wright. Date of Hearing: 4/28/00. [00-10784] Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 8/22/00 for Janet Wright (mrw)

DATE	PROCEEDINGS
8/10/00	Appearance form filed by James William Marcus for Appellant Thomas Joe Miller-El. [00-10784] (mrw)
8/17/00	District Court Order - COA denied. Date Denied: 8/14/00 [00-10784] Awaiting DC Action ddl satisfied. (mrw)
8/24/00	Transcript order acknowledgment received from Court Reporter Janet Wright. Estimated pages: 35 Date Financial Arrangements Made: 8/4/00 [00-10784] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 9/5/00 for Janet Wright. Ct. Reporter Discount Date is 10/4/00 for Janet Wright. (mrw)
8/30/00	Record on appeal filed. Vol(s) of Pleadings: 13 Exhibits: 4 Boxes (Containing 11 folders of SCP) SEALED: 2 Envelopes. (1 Contains Volume #4) and (1 Contains Exhibits) [00-10784] (mrw)
10/18/00	Discount of 10 percent invoked for Court Reporter Janet Wright [00-10784] Transcript ddl updated to 11/6/00 for Janet Wright. Ct. Reporter Discount Date updated to 11/6/00 for Janet Wright. (mrw)
11/3/00	Supplemental record on appeal filed. Supplement #: 1 Vol(s) of Transcripts: 1 [00-10784] Transcript Deadline Satisfied. Court Reporter Discount Date Cancelled. (mrw)
11/6/00	BR-7 Letter issued to parties since COA denied in District Court. [00-10784] Motion for COA due on 12/18/00 for Thomas Joe Miller-El. Brief in Support of COA due on 12/18/00 for Thomas Joe Miller-El. (mrw)
11/7/00	Record on appeal released to attorney James William Marcus for Appellant Thomas Joe Miller-El. Volumes: 12 (Vols 1-3 & 5-13, only) Supplemental Volumes: 1. [00-10784] (lrc)

DATE	PROCEEDINGS
12/1/00	Extension granted by phone until: 1/17/01 to file Motion for COA & Brief in Support for Appellant Thomas Joe Miller-El. [00-10784] (mrw)
12/4/00	Confirmation letter filed by Appellant Thomas Joe Miller-El confirming an extension of time to and including 1/17/01 for filing Motion for COA & Brief. [00-10784] Motion due ddl updated to 1/17/01 for Thomas Joe Miller-El. Brief in Support ddl updated to 1/17/01 for Thomas Joe Miller-El. (mrw)
12/5/00	Attorney motion filed by James William Marcus for Appellant Thomas Joe Miller-El to substitute counsel Elizabeth Detweiler for Andrew Hammel [3073649-1] [00-10784] (mrw)
12/8/00	COURT Order filed granting attorney motion to substitute counsel [3073649-1] (attorney Andrew A Hammel for Thomas Joe Miller-El terminated) Atty added: Elizabeth Detweiler (HRD) Copies to all counsel. [00-10784] (mrw)
12/12/00	Criminal Justice Act 20 voucher issued to Elizabeth Detweiler for Appellant Thomas Joe Miller-El . [00-10784] (jar)
1/10/01	Motion filed by Appellant Thomas Joe Miller-El to file brief in support of COA in excess of the word count limitation but not to exceed 28,000 words. [3106144-1] [00-10784] (mrw)
1/18/01	COURT Order filed granting appellant's motion to file brief in support of COA in excess of the word count limitation, but not to exceed 28,000 [3106144-1] (HRD) Copies to all counsel. [00-10784] (mrw)
1/22/01	Motion filed by Appellant Thomas Joe Miller-El for certificate of appealability [3114865-1] Motion due ddl satisfied. [00-10784] (mrw)

DATE	PROCEEDINGS
1/22/01	Brief filed in support of motion for Certificate of Appealability (Incorporated in motion) [3114865-1] by Appellant Thomas Joe Miller-El Brief in Support ddl satisfied. [3114867-1] [00-10784] (mrw)
1/22/01	Record on appeal returned to 5CCA. Volumes: 1-3 & 5-13 Supplemental Volumes: 1 [00-10784] (mrw)
2/12/01	Extension granted by phone until: 3/23/01 to file response to COA for Appellee Gary L Johnson. [00-10784) (mrw)
2/21/01	Confirmation letter filed by Appellee Gary L Johnson confirming an extension of time to and including 3/23/01 for filing Response to COA. [00-10784] (mrw)
3/23/01	Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3114865-1] by Appellant Thomas Joe Miller-El Response/Opposition ddl satisfied. [3172759-1] [00-10784] (mrw)
4/2/01	Motion filed by Appellant Thomas Joe Miller-El [3181575-1] for leave to file reply to response/opposition [3172759-1] by Appellee Gary L Johnson [00-10784] (mrw)
4/5/01	COURT Order filed granting appellant's motion for leave to file reply to respondent's response/opposition to COA by 4/13/01 [3181575-1] (HRD) Copies to all counsel. [00-10784] (mrw)
4/13/01	Reply filed by Appellant Thomas Joe Miller-El to response/opposition [3172759-1], motion for Certificate of Appealability [3114865-1] [3195886-1] [00-10784] (mrw)

DATE	PROCEEDINGS
5/21/01	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
5/21/01	Criminal Justice Act 20 received from Elizabeth Detweiler for Appellant Thomas Joe Miller-El Timely: y/interim request #1. [00-10784] (cgp)
8/7/01	Opinion order filed denying appellant's motion for Certificate of Appealability. (ISSUED AS AND FOR THE MANDATE) [3114865-1] Issd in T form? y Judge EHJ HRD RMP [00-10784] (jma)
8/7/01	Mandate issued. Approved BOC Issued (Y/N)?: n [00-10784] (jma)
8/9/01	Record on appeal returned to 5CCA. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (Containing 11 folders SEALED: 2 Envelopes (Volume #4) & (1 Containing Exhibits) [00-10784] Case Management ddl satisfied. (mrw)
8/9/01	Record on appeal returned to USDC. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (containing 11 folders SEALED: 1 Env. [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing. # of copies filed: 4 Sufficient [Y/N]: N need copy of court's opinion [3350091-1] Sufficient Rehearing due on 8/31/01 for Thomas Joe Miller-El . [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing en banc. # of copies filed: 20 Sufficient [Y/N]: N copy of court's original opinion [3350358-1] [00-10784] (mrw)
8/23/01	Rehearing made sufficient by Appellant Thomas Joe Miller-El [00-10784] Sufficient Rehearing ddl satisfied. (mrw)

DATE	PROCEEDINGS
9/12/01	COURT Order filed denying petition for rehearing [3350091-1], denying petition for rehearing en banc [3350358-1] With poll (Y/N)?: N Copies to all counsel. [00-10784] (mrw)
1/18/02	Supreme Court notice that petition for certiorari was filed on 12/11/01 by Appellant Thomas Joe Miller-El. Supct No.: 01-7662 [00-10784] (cav)
2/15/02	Supreme Court order received granting petition certiorari [3486654-1] by Appellant Thomas Joe Miller-El on 2/15/02. [00-10784] (mrw)
6/3/02	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/supplemental payment request. [00-10784] (cgp)
6/3/02	Criminal Justice Act 20 received from Elizabeth Detweiler or Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
8/15/02	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Volumes: 1 [00-10784] (mrw)
3/3/03	Supreme Court opinion (dated 2/25/03) filed. [00-10784] Supreme Court Judgment due on 4/2/03. (mrw)
4/9/03	Supreme Court judgment filed. [00-10784] Supreme Court Judgment ddl satisfied. (mrw)
5/12/03	Non-dispositive opinion filed issuing a Certificate of Appealability on Petitioner's jury selection claim premised on Batson v. Kentucky, 476 U.S. 79 (1986). Published? Y Issd in T form? Y Type of non-disp.: PC [00-10784] (kgc)
5/12/03	Case reopened. [00-10784] (mrw)

DATE	PROCEEDINGS
5/12/03	COURT Order filed granting certificate of appealability. [4225458-1] (WED, EHJ, HRD) (HANDLED IN NON-DISPOSITIVE OPINION. Copies to all counsel. [00-10784] (dtg)
5/13/03	Briefing notice issued. [00-10784] A/Pet's Brief due on 6/2/03 for Thomas Joe Miller-El. E/Res's Brief due on 6/20/03 for Gary L Johnson. (mrw)
5/16/03	Attorney motion filed by James William Marcus for Appellant Thomas Joe Miller-El to substitute counsel Andrew Hammel for Elizabeth Detweiler [4193603-1] Date of COS: 5/15/03. [00-10784] (jbr)
5/21/03	COURT Order filed granting attorney motion to substitute counsel [4193603-1] (attorney Elizabeth Detweiler for Thomas Joe Miller-El terminated) Atty added: Andrew Hammel (HRD) Copies to all counsel. [00-10784] (mrw)
6/2/03	Appearance form filed by Andrew A Hammel for Appellant Thomas Joe Miller-El. [00-10784] (lmc)
6/2/03	Appellant's Brief filed by Appellant Thomas Joe Miller-El. Copies of Brief: 7 # of pages: 60 Word count: 13,878 Date of COS: 5/31/03 Hand Delivered [Y/N]: N Disk Provided [Y/N]: Y. [4208296-1] [00-10784] A/Pet's Brief ddl satisfied. (jbr)
6/2/03	Record excerpts filed by Appellant Thomas Joe Miller-El # of copies: 4 Sufficient [Y/N]: Y. [00-10784] (jbr)
6/20/03	Appellee's Brief filed by Appellee Janie Cockrell. Copies of Brief: 7 # of pages: 56 Word count: 13,996 Date of COS: 6/19/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4227291-1] [00-10784] E/Res's Brief ddl satisfied. Reply Brief due on 6/26/03 for Thomas Joe Miller-El. (mrw)

DATE	PROCEEDINGS
6/26/03	Reply brief filed by Appellant Thomas Joe Miller-El. Copies of Brief: 7 # of pages: 29 Word count: 6,901 Date COS: 6/25/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4234416-1] [00-10784] Reply Brief ddl satisfied. (mrw)
6/26/03	Record requested from district court. [00-10784] ROA due on 7/11/03. (mrw)
7/11/03	Record on appeal filed. Vol(s) of Pleadings: 13 Vol(s) of Transcripts: 1 Exhibits: 4 Boxes SCP SEALED: 2 Envs (1 Contains Volume #4) and (1 Contains Exhibits). [00-10784] ROA ddl satisfied. (mrw)
8/1/03	Case calendared for oral argument. [00-10784] (gam)
8/21/03	Appearance form filed by Gena Blount Bunn for Appellee Janie Cockrell. [00-10784] (mrw)
11/3/03	Oral argument heard. Case argued by Gena Blount Bunn for Appellee Doug Dretke, James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El [00-10784] (sme)
2/26/04	Opinion filed. Issd in T form? Y Mandate pull date is 3/18/04. [00-10784] (kgc)
2/26/04	Judgment entered and filed. [00-10784] (kgc)
3/4/04	Record on appeal returned to 5CCA. Volumes: 14 Exhibits: 4 Boxes SCP SEALED: 2 Sealed Envs [00-10784] (mrw)
3/19/04	Mandate issued. Approved BOC Issued (Y/N)?: n [00-10784] Mandate pull date satisfied. (tdb)
3/19/04	Record on appeal returned to USDC. Volumes: 14 Exhibits: 4 boxes SEALED: 2 envs (1-contains VOL # 5). [00-10784] (tdb)
4/6/04	Supreme Court notice that petition for certiorari was filed on 04/01/04 by Appellant Thomas Joe Miller-El. Supct No.: 03-9659 [00-10784] (dse)

DATE	PROCEEDINGS
6/28/04	Supreme Court order received granting petition certiorari [4796696-1] by Appellant Thomas Joe Miller-El on 06/28/04. [00-10784] (cav)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)
[FILED 07/16/96]

CIVIL DOCKET FOR CASE H: 96-CV-1992

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
07/16/1996	1	APPLICATION by plaintiff Thomas Joe Miller-El for Stay of Execution (15+). 0 (amy) (Entered:07/17/1996)
07/16/1996	1	MOTION by plaintiff Thomas Joe Miller-El for appointment of counsel (15+), (amy) (Entered: 07/17/1996)
07/16/1996	2	MOTION by plaintiff Thomas Joe Miller-El to proceed in forma pauperis (3), (amy) (Entered: 07/17/1996]
07/16/1996	3	Statement of Willingness to Accept Appointment by movant Mandy Welch, movant Gregory W Wiercioch, movant James Marcus (5). (amy) (Entered: 07/17/1996]

DATE	NO.	PROCEEDINGS
07/16/1996		PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (amy) (Entered: 01/17/1996)
07/17/1996	4	ORDER granting [1-1] application for stay of execution. The execution date of 7/30/96 is hereby stayed; Mandy Welch, director of the Texas Defender service is appointed for Mr. Miller-El; a Texas Defender Service Staff Attorney, designated by Ms. Welch will enter an appearance as attorney-in-charge within 10 days of the date of this order; appointed counsel is granted 120 days from the date of this order within which to file a petition for writ of habeas corpus on behalf of the plaintiff (signed by HBS) copies to counsel: 07/17/1996 FAXED Page(s) 2 (amy) (Entered: 07/17/1996)
07/17/1996	5	ORDER granting [2-1] motion to proceed in forma pauperis (signed by HBS) Copies to counsel: 7/17/96 FAXED Page(s) 1 (amy) (Entered: 07/17/1996)
07/23/1996	6	MOTION by Thomas Joe Miller-El for Jim Marcus to appear pro hac vice (4) (bjj) [Entered: 07/24/1996]
07/23/1996	7	ORDER granting [6-1] motion for Jim Marcus to appear pro hac vice (signed by Judge Sanders) Copies to counsel: 7/24/96 Page(s) 1 (bjj) [Entered: 07/24/1996]

DATE	NO.	PROCEEDINGS
07/23/1996	8	MOTION by defendant Director TDCJ for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (lch) [Entered: 07/24/1996]
07/23/1996	9	NOTICE of attorney appearance for plaintiff Thomas Joe Miller-El by Gregory William Wiercioch, Jim Marcus (2) (lch) [Entered: 07/24/1996]
07/24/1996	10	NOTICE of Intent to Respond by plaintiff Thomas Joe Miller-El (2) (tsp) [Entered: 07/25/1996]
07/24/1996	11	ORDER Response to motion reset to 8/6/96 for [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (signed by Judge Sanders) Copies to counsel: 7/25/96 Page(s) 1 (lmn) [Entered: 07/25/1996]
06/6/1996	12	RESPONSE by plaintiff Thomas Joe Miller-El to [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (wcc) [Entered: 08/07/1996]
08/12/1996	13	ORDER granting [8-1] motion for re-con-sideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition the petition will be due 10/21/96 (signed by HBS) Copies to counsel: 08/13/96 Page(s) 1 (wcc) [Entered date 08/13/1996]
09/20/1996	14	EX PARTE SEALED MOTION (svc) (Entered: 09/20/96)
09/26/1996	15	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 09/27/1996]

DATE	NO.	PROCEEDINGS
10/09/1996	17	MOTION by plaintiff Thomas Joe Miller-El to extend time to file petition for writ of HC (6) (wcc) [Entered: 10/15/1996]
10/10/1996	16	ORDER ... granting petr's mot for ext of time to file petition for writ of HC Granted (signed by hbs) Copies to counsel: 10.10.96 Page(s) 1 (wcc): (Entered: 10/10/1996)
11/01/1996	18	SEALED EX PARTE DOCUMENT placed in sealed area (klm) (Entered 11/01/1996)
11/01/1996	19	MOTION by plaintiff Thomas Joe Miller-El to extend time to file Petition for Writ of Habeas Corpus (15+) (klm) (Entered: 11/01/1996)
11/01/1996	21	ORDER ... petition for writ of HC must be filed by noon 12/13/96 (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) (Entered: 11/06/1996)
11/05/1996	20	Request by plaintiff Thomas Joe Miller-El for Court to take judicial notice of Fifth Circuit Opinion (15+) (wcc) [Entered: 11/06/1996]
11/05/1996	22	ORDER Response to motion reset to 12:00 11/19/96 for [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) (Entered 11/06/1996)
11/14/1996	23	RESPONSE by defendant Director TDCJ in opposition to [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (10) (k1m) (Entered: 11/14/1996)

DATE	NO.	PROCEEDINGS
11/15/1996	24	MOTION by plaintiff Thomas Joe Miller-El for leave to file Reply to respondent Johnson's opposition to petitioner's motion for extension of time to file federal Habeas Petition 3) (wcc) (Entered: 11/15/1996)
11/20/1996	25	ORDER denying [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) copies to counsel: 11.20.96 Page(s) 1 (wcc) (Entered: 11/20/1996)
11/25/1996	26	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 11/26/1996]
12/12/1996	27	SEALED DOCUMENT placed in sealed area (ldm) [Entered: 05/08/1997]
03/04/1997	28	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for Writ of HC within statutory one year deadline (15+) (wcc) [Entered: 03/05/1997]
03/05/97	29	ORDER Response to motion reset to 12:00 3/14/97 for [28-1] motion for leave to file petition for Writ of HC within statutory one year deadline (signed by HBS) Copies to counsel: 03.05.97 Page(s) 1 (wcc) (Entered: 03/05/1997)
03/10/1997	30	ORDER ... vacating order of 11/1/96 pending a ruling on motion for extension of statutory one year deadline HC (signed by HBS) Copies to counsel: 03.10.97 Page(s) 1 (wcc) (Entered: 03/10/1997)

DATE	NO.	PROCEEDINGS
03/10/1997	31	RESPONSE by defendant Director TDCJ in opposition to [28-1] motion for leave to file Petition for Writ of HC within statutory one year deadline (5) (wcc) (Entered: 3/10/1997)
03/11/1997	32	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (10) (wcc) [Entered: 03/12/1997]
03/13/1997	33	ORDER granting [32-1] motion for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) [Entered: 03/14/1997]
03/13/1997	34	RESPONSE by plaintiff Thomas Joe Miller-El in opposition to [31-1] opposition response (7) (wcc) [Entered: 03/14/1997]
03/14/1997	35	ORDER granting [28-1] motion for leave to file Petition for Writ of HC within statutory one year deadline; due 06.17.97 (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) (Entered: 03/14/1997)
04/10/1997	36	SEALED DOCUMENT placed in sealed area (ldm) [Entered: 05/08/1997]
04/11/1997	37	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (8) (wcc) (Entered: 04/11/1997)

DATE	NO.	PROCEEDINGS
04/11/1991	38	ORDER Response to motion reset to 12:00 4/18/97 for [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 04.14.97 Page(s) 1 (wcc) (Entered 04/14/1997)
04/15/1997	39	SEALED DOCUMENT placed in sealed area (wcc) (Entered 04/18/1997)
04/18/1997	40	RESPONSE by defendant Director TDCJ in opposition to [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (11) (wcc) (Entered 04/21/1997)
04/21/1997	41	SEALED DOCUMENT placed in sealed area (wcc) (Entered: 04/21/1997)
04/22/1997	42	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97 (wcc) Modified on 05/15/1997 (Entered: 04/22/1997)
04/24/1997	43	MOTION by defendant Director TDCJ to strike petitioner's ex parte sealed motions for investigative funds (6) (wcc) (Entered: 04/24/1997)
04/28/1997	44	ORDER OF USCA (certified copy) Re: The petition for writ of mandamus is DENIED; (2) cc to judge. (st) [Entered: 04/29/1997]

DATE	NO.	PROCEEDINGS
09/30/1997	45	RESPONSE by plaintiff Thomas Joe Miller-El to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15+) (wcc) (Entered: 04/30/1997)
05/01/1997	46	REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (14) (wcc) (Entered: 05/01/1997)
05/06/1997	47	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 05/07/1997]
05/07/1997	48	SEALED DOCUMENT placed in sealed area (wcc) (Entered: 05/07/1997)
05/16/1997	49	SUPPLEMENTAL REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15) (wcc) (Entered: 05/16/1997)
06/17/1997	50	MEMORANDUM OPINION AND ORDER re: compensation of counsel see order for details (signed by HBS) Copies to counsel: 06.17.99 Page(s): 4 (wcc) (Entered: 06/17/1997)
06/17/1997	51	PETITION for writ of habeas corpus; Date Received: 06.17.97 (5 volumes) (under separate cover) (wcc) (Entered: 06/17/1997)

DATE	NO.	PROCEEDINGS
06/17/1997	52	ORDER denying [42-1] motion for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97, denying [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 06.17.97 Page(s) 1 (wcc) (Entered: 06/17/1997)
06/17/1997	53	ORDER REFERRING CASE to Magistrate Judge Jeff Kaplan (signed by HBS) Copies to counsel: 06.17.97 Page(s): 1 (wcc) (Entered: 06/17/1997)
06/18/1997	54	ORDER denying [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (signed by HBS) Copies to counsel: 06.18.97 Page(s) 2 (wcc) (Entered: 06/18/1997)
06/20/1997	55	ORDER to show cause, set answer due for 9/15/97 for Director TDCJ (signed by JKaplan) Copies to counsel: CMRRR 6/20/97 Page(s) 1 (ldf) [Entered: 06/23/1997]
07/08/1997	56	CERTIFIED MAIL executed as to Director TDCJ 7/1/97 [55-3] order (1) (jas) (Entered: 07/08/1997)
07/21/1997	57	SEALED DOCUMENT placed in sealed area (jas) (Entered: 07/21/1997)

DATE	NO.	PROCEEDINGS
07/28/1997	58	ORDER that the Court's 6/16/97 memorandum Order is amended as follows: counsel shall submit vouchers once every two months, see order for specifics (signed by Magistrate Kaplan) Copies to counsel: 7/28/97 Page(s) 1 (jas) (Entered: 07/28/1997)
08/12/1997	59	Amended PETITION for writ of habeas corpus; Date Received: 8/12/97 (15+) (USC) (jas) [Entered 08/13/1997]
08/22/1997	60	MOTION with memorandum in support by defendant Director TDCJ to substitute Erik Everett Cary for Laura Bayouth Popps (3) (jas) (Entered: 08/22/1997)
08/22/1997	61	MOTION with memorandum in support by defendant Director TDCJ to extend time within which to file a responsive pleading (3) (jas) (Entered: 08/22/1997)
08/22/1997	62	ORDER granting [60-1] motion to substitute Erik Everett Cary for Laura Bayouth Popps (signed by Magistrate Kaplan) copies to counsel: 8/25/97 Page(s) 1 (jas) (Entered: 08/25/1997]
08/22/1997	63	ORDER granting [61-1] motion to extend time within which to file a responsive pleading reset answer due for 9/18/97 for Director TDCJ (signed by Magistrate Kaplan) Copies to counsel: 8/25/97 Page(s) 1 (jas) [Entered: 08/25/1997]
09/02/1997	64	SEALED DOCUMENT placed in sealed area (jas) (Entered: 09/02/1997)

DATE	NO.	PROCEEDINGS
09/19/1997	65	ANSWER to Complaint by defendant Director TDCJ and Motion for Summary Judgment and Supporting Brief (15+) (jas) (Entered: 09/19/1997)
09/19/1997	65	MOTION with memorandum in support by defendant Director TDCJ for summary judgment (15+) (jas) (Entered: 09/19/1997)
09/24/1997	66	NOTICE of Re-Designation of Attorney-In-Charge by plaintiff Thomas Joe Miller-El (2) (jas) (Entered: 09/24/1997)
09/24/1997	67	MOTION with memorandum in support by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 (5) (jas) (Entered: 09/24/1997)
09/25/1997	68	ORDER granting [67-1] motion for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 Response to motion reset to 11/7/97 for [65-1] motion for summary judgment (signed by Magistrate Kaplan) copies to counsel: 9/25/97 Page(s) 1 (jas) (Entered: 09/25/1997)
09/25/1997	69	Minute order: Ex Parte Hearing re: Attorney fees Held before Magistrate Judge Jeff Kaplan, taken under advisement; supplemental materials due by end of the week Court Reporter: electronic (2) (jas) (Entered: 09/26/1997)
10/17/1997	70	SEALED DOCUMENT placed in sealed area (jas) (Entered: 10/17/1997)
10/21/1997	71	SEALED DOCUMENT placed in sealed area (jas) (Entered: 10/22/1997)

DATE	NO.	PROCEEDINGS
11/06/1997	72	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time/to reschedule due date for petitioner's reply to appellant's answer (3) (jas) [Entered 11/07/1997]
11/07/1997	73	ORDER granting [72-1] motion to extend time/to reschedule due date for petitioner's reply to appellant's answer; the reply is now due on 11/10/97. (signed by Magistrate Kaplan) Copies to counsel: 11/10/97 Page(s) 1 (jas) [Entered: 11/10/1997]
11/10/1997	74	CROSS MOTION for summary judgment by plaintiff Thomas Joe Miller-El (3) (jas) [Entered: 11/12/1997]
11/10/1997	75	Reply to respondent's answer and MEMORANDUM by plaintiff Thomas Joe Miller-El in support of [74-1] cross motion for summary judgment (15+) (USC) (jas) [Entered: 11/12/19971
11/18/1997	76	SEALED DOCUMENT placed in sealed area (jas) (Entered: 11/18/1997)
11/19/1997	77	**UNFILED PER ORDER UNFILING PLEADING 12/5/97** NOTICE of intent to supplement the record and to file motions for discovery and an evidentiary hearing by plaintiff Thomas Joe Miller-El (15+) (jas) Modified on 12/08/1997 (Entered: 11/20/1997)
11/24/9797	78	SEALED DOCUMENT placed in sealed area (jas) (Entered: 11/24/1997)

DATE	NO.	PROCEEDINGS
12/05/1997	79	ORDER unfiling [77-1] notice by plaintiff Thomas Joe Miller-El due to the following deficiency: FRCP make no provision for the filing of such a notice. Copies to counsel: 12/8/97 (signed by Judge Jeff Kaplan) Page (s) 2 (jas) (Entered: 12/08/1997)
12/08/1997	80	MOTION by plaintiff Thomas Joe Miller-El for discovery (17) (jas) (Entered: 12/08/1997)
12/08/1991	81	MOTION by plaintiff Thomas Joe Miller-El in the alternative to petitioner's cross-motion for sum jgm for an evidentiary Hearing (12) (jas) (Entered: 12/08/1997)
12/08/1997	82	Supplemental MEMORANDUM by plaintiff Thomas Joe Miller-El on Batson/Swain claim based on previously unavailable evidence (15+) (USC) (jas) (Entered: 12/08/1997)
12/08/1997	83	MOTION by plaintiff Thomas Joe Miller-El for leave to file supplemental briefing or in the alternative to amend (6) (jas) (Entered: 12/10/1997)
04/24/1998	84	SEALED DOCUMENT placed in sealed area (jas) (Entered: 04/27/1998)
04/27/1998	85	SEALED DOCUMENT placed in sealed area (jas) (Entered: 04/28/1998)
06/16/1998	86	SEALED DOCUMENT placed in sealed area (jas) (Entered: 06/17/19[illegible])
06/30/1998	87	SEALED DOCUMENT placed in sealed area (lch) (Entered: 07/02/1998)
03/03/1999	88	MOTION by plaintiff Thomas Joe Miller-El for execution date (1) (jas) (Entered: 03/08/1999)

DATE	NO.	PROCEEDINGS
03/08/1999	89	ORDER re: pla's mtn for execution date; petitioner shall file a response to this order by 3/19/99 and respondent shall file a response by 3/30/99 re: whether an execution date has been set and whether petitioner wants to dismiss his application for writ of habeas corpus or proceed with the case. See Order for specifics (signed by Magistrate Kaplan) Copies to counsel: 3/8/99 Page(s) 2 (jas) (Entered: 03/08/1999)
03/17/1999	90	AFFIDAVIT by plaintiff Thomas Joe Miller-El Re: [89-1] order (1) (jas) (Entered: 03/18/1999)
03/19/1999	91	Memorandum to the Court / RESPONSE by plaintiff Thomas Joe Miller-El to [89-1] order (5) (jas) (Entered: 03/22/99)
03/30/1999	92	RESPONSE by defendant Gary Johnson to [89-1] order (4) (jas) (Entered: 03/31/1999)
03/31/1999	93	ORDER petitioner has reaffirmed his desire to prosecute this death penalty habeas case ... the Court will disregard any statements to the contrary contained in petitioner's letter dated 2/27/99. (signed by Magistrate Kaplan) Copies to counsel: 3/31/1999 Page(s) 1 (jas) (Entered 03/31/1999)

DATE	NO.	PROCEEDINGS
07/28/1999	94	ORDER ... The parties are directed to answer these issues (specified in this order) in a written response; Petitioner shall file him response to this order by 08/16/99: Respondent shall file his response by 08/31/99; Responses shall not exceed 15 pages in length; No further pleadings will be allowed w/out leave of court see Order for specifics (signed by Magistrate Judge Kaplan) Copies to counsel: 07.28. 99 Page (s) 3 (lag) (Entered: 07/28/1999)
08/16/1999	95	Supplemental Court-Ordered Briefing/RESPONSE by plaintiff Thomas Joe Miller-El to [94-1] order (17) (jas) (Entered: 08/17/1999)
09/02/1999	96	Supplemental Court-Ordered Briefing on Procedural issues/RESPONSE by defendant Gary Johnson to [94-1] order (6) (jas) (Entered: 09/03/1999)
12/03/1999	97	SEALED DOCUMENT placed in sealed area (svc) (Entered: 12/06/99)
12/08/1999	98	SEALED DOCUMENT placed in sealed area (amy) (Entered: 12/08/1999)
12/10/1999	99	SEALED EX PARTE DOCUMENT placed in sealed area (svc) (Entered: 12/13/1999)
12/15/1999	100	SEALED DOCUMENT placed in sealed area (svc) (Entered: 12/16/1999)
12/15/1999	101	SEALED DOCUMENT placed in sealed area (svc) (Entered 12/16/1999)

DATE	NO.	PROCEEDINGS
01/31/2000	102	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS Petitioner's application for Habeas Corpus should be denied Signed by Judge Kaplan. Copies to cnsl: 1/31/00 Case no longer referred to Magistrate Judge Jeff Kaplan Objections to F and R due by 2/16/00 (15+) (nmc) Modified on 02/10/2000 (Entered: 01/31/2000)
01/31/2000		PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (nmc) (Entered: 01/31/2000)
01/31/2000	103	ORDER Instructions for service and notice of right to object (signed by Judge Kaplan) Copies to counsel: 1/31/00 Page(s) 2 (nmc) (Entered: 01/31/2000)
02/07/2000	104	CERTIFIED MAIL executed as to Gregory W Wiercioch 2/2/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)
02/07/2000	105	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00] (Entered: 02/08/2000)
02/07/2000	106	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00] (Entered: 02/08/2000)
02/07/2000	107	CERTIFIED MAIL executed 2/2/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)
02/07/2000	108	CERTIFIED MAIL executed as to Thomas Joe Miller-El 2/3/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)

DATE	NO.	PROCEEDINGS
02/10/2000	109	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time to file objections to Magistrate Judge's findings and recommendations (3) (nmc) (Entered: 02/10/2000)
02/10/2000	110	ORDER granting [109-1] motion to extend time to file objections to Magistrate Judge's findings and recommendations Objections reset to 2/25/00 for [102-1] findings & recommendations (signed by Judge Sanders) Copies to counsel. 2.11.00 Page (s) 1 (mln) (Entered: 02/11/2000)
02/25/2000	111	MOTION by plaintiff Thomas Joe Miller-El for oral argument on petitioner's objections to the Magistrate judge's memorandum and recommendation (6) (nmc) (Entered: 02/28/2000)
02/25/2000	112	OBJECTION by plaintiff Thomas Joe Miller-El to [102-1] findings & recommendations (15+) (nmc) (Entered: 02/28/2000)
02/28/2000	113	Corrected OBJECTION by plaintiff Thomas Joe Miller-El to [102-1] findings & recommendations (15+) (nmc) (Entered: 02/29/2000)
03/07/2000	114	ORDER The court will hear oral argument on Findings and Recommendation and Petitioner's objections on 3/22/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/8/00 Page(s) 1 (nmc) (Entered: 03/08/2000)
03/15/2000	115	Unopposed MOTION by defendant Gary Johnson to continue (3) (nmc) (Entered: 03/16/2000)

DATE	NO.	PROCEEDINGS
03/15/2000	116	Letter from Ann Kraatz notifying that she is now that attorney for Johnson (nmc) (Entered: 03/17/2000)
03/17/2000	117	ORDER granting [115-1] motion to continue The oral argument is reset for 4/28/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/17/00 Page(s) 1 (nmc) (Entered: 03/17/2000)
04/28/2000	118	Minute order: Oral Argument re: Findings and Recommendation of US Magistrate Judge Kaplan Held before Senior Judge Barefoot Sanders Court Reporter: Janet Wright ... Oral Argument concluded. Order to be forthcoming (1) (vdf) (Entered: 05/01/2000)
05/08/2000	119	POST ARGUMENT BRIEF by plaintiff Thomas Joe Miller-El (8) (vdf) (Entered: 05/08/2000)
05/17/2000	120	APPLICATION/MOTION by plaintiff Thomas Joe Miller-El for Andrew Hammel to appear pro hac vice (3) (vdf) (Entered: 05/18/2000)
05/17/2000	120	ORDER granting [120-1] motion for Andrew Hammel to appear pro hac vice (signed by Judge Sanders) Copies to 05/18/00 Page(s) 3 (vdf) (Entered: 05/18/2000)
06/05/2000	121	MEMORANDUM OPINION AND ORDER ...The Court Adopts the Magistrate Judge's Findings and Recommendations. Miller-El's petition for writ of habeas corpus is hereby DENIED. (See order for specifics) (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s) : 6 (vdf) (Entered: 06/05/2000)

DATE	NO.	PROCEEDINGS
06/05/2000	122	JUDGMENT against plaintiff Thomas Joe Miller-El ...This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated 06/05/00. It is ordered that the Court that petitioner Thomas Joe Miller-El's Petition for Writ of Habeas Corpus be, and the same is hereby, DENIED and DISMISSED. (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s): 1 (vdf) (Entered: 06/05/2000)
06/05/2000		Case closed (vdf) (Entered 06/05/2000)
06/19/2000	123	MOTION by plaintiff Thomas Joe Miller-El to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (12) (vdf) (Entered: 06/19/2000)
06/21/2000	124	ORDER denying [123-1] motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (See order for specifies) (signed by Judge Sanders) Copies to counsel: 06/22/00 Page(s) 1 (vdf) (Entered: 06/22/2000)
07/20/2000	125	NOTICE of APPEAL by plaintiff Thomas Joe Miller-El re [124-1] order Payment: No fee paid TO Mailed (3) cc:Judge (jmr) (Entered: 07/20/2000)
07/20/2000		Notice of appeal and certified copy of docket to USCA: [125-1] appeal (jmr) (Entered: 07/20/2000)
07/27/2000		USCA Case Number 00-10784 for 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/28/2003)

DATE	NO.	PROCEEDINGS
08/02/2000	126	MOTION by plaintiff Thomas Joe Miller-El for certificate of appealability (8) (nmc) [Entered: 08/03/2000)
08/08/2000	127	Transcript order form from Attorney for Plaintiff: Transcript requested [125-1] appeal 4/28/00 Oral Argument, Court Reporter is Janet Wright (jmr) (Entered: 08/08/2000)
08/14/2000	128	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS of Magistrate Judge Jeff Kaplan Re: [126-1] motion for certificate of appealability should be denied; IFP should be granted;Motion no longer referred (2) cc: Judge (jmr) (Entered: 08/14/2000)
08/14/2000	128	ORDER ADOPTING [128-1] findings & recommendations (Signed by Judge Sanders) Copies to counsels: 8/14/00 Page(s): 2 (jmr) (Entered: 08/14/2000)
08/14/2000	128	ORDER denying [126-1] motion for certificate of appealability is denied proceed in forma pauperis is granted (signed by Judge Sanders) Copies to counsel: 8/14/00 Page(s) 2 (jmr) (Entered: 08/14/2000)
08/14/2000		Deadline updated; appeal record due set for 8/28/00 for [125-1] appeal (jmr) (Entered: 08/14/2000)
08/28/2000		Transmitted record on appeal 12 vol. record, 1 Sealed vol. and 13 SCR folders to U.S. court of Appeals: [125-1] appeal (jmr) Modified on 08/28/2000 (Entered: 08/23/2000)

DATE	NO.	PROCEEDINGS
10/11/2000	129	TRANSCRIPT filed Appeal record due on 10/26/00 [125-1] appeal for date of 4/28/00 Oral Argument (jmr) (Entered: 10/11/2000)
10/31/2000		Transmitted supplemental record of 4/28/00 transcript on appeal: [125-1] appeal (jmr) (Entered 10/31/2000)
08/09/2001	130	OPINION Of USCA ...COA is denied (certified copy) in accordance with USCA judgment re: [125-1] appeal (21) cc: Judge (jmr) (Entered: 08/09/2001)
08/13/2001		Record on appeal returned 12 vol. record, 1 transcript, 13 SCR folders and 2 sealed vols. from U.S. Court of Appeals: appeals (jmr) (Entered: 08/13/2001)
08/16/2002		Transmitted 12 vol. Record, 2 vol. Sealed record, 1 transcript and 13 vol. SCR papers on appeal to Supreme Court of the U.S. appeal (jmr) (Entered: 08/16/2002)
08/16/2002		U.S. Supreme Court Case Number 01-7662 for 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/28/2003)
03/28/2003		Appeal Record Returned from the U.S. Supreme Court: 12 vol. Record, 2 sealed vol., 1 transcript, and 13 vol. SCR papers. 125 Notice of Appeals (jmr) (Entered: 03/28/2003)
06/26/2003		Set Appeal Deadline re 125 Notice of Appeal: Appeal Record due by 07/10/2003 (jmr) (Entered: 06/26/2003)

DATE	NO.	PROCEEDINGS
07/08/2003		Certified and Transmitted Record on Appeal to U.S. Court of Appeals: 12 vol. Record, 2 vol. sealed record, 1 transcript and 15 vol. SCR papers; re 125 Notice of Appeal (jmr) (Entered: 07/08/2003)
03/23/2004		Appeal Record Returned: 12 vol. record, 1 transcript, 2 vol. sealed record, 15 vol. SCR papers; 125 Notice of Appeal (jmr) (Entered: 03/23/2004)
03/23/2004	131	Opinion of USCA: Affirmed; (certified copy) in accordance with USCA judgment re 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/23/2004)
03/23/2004	132	JUDGMENT/MANDATE of USCA: Judgment of the District Court is affirmed; as to 125 Notice of Appeal filed by Thomas Joe Millerl-El. Issued as Mandate: 3/19/04. (jmr) (Entered: 03/23/2004)

II. PLEADINGS

A. Direct Appeal—CCA #69,677, Dist Ct. #F85—78668

No.	Court	Document	Date
1	CCA	1st Motion for Extension of Time in Which to File Appellant's Brief	12/19/86
2	CCA	Order extending time to 2/2/87	12/23/86
3	CCA	2nd Motion for Extension of Time in Which to File Appellant's Brief	2/2/87
4	CCA	Order extending time to 3/15/87	2/3/87
5	CCA	Motion requesting extension	
6	CCA	Order extending time to 4/15/87	3/11/87
7	CCA	Motion for Extension of Time in Which to File Brief	4/15/87
8	CCA	Order extending time to 4/27/87	4/15/87
9	CCA	Brief for the Appellant	4/27/87
10	CCA	Motion to Extend Page Limitation of Brief	4/27/87
11	CCA	1st State's Motion to Extend the Time for Filing the State's Brief	5/19/87
12	CCA	Order extending time to 7/26/87	5/19/87
13	CCA	State's Motion to Extend the Time for Filing the State's Brief	7/27/87
14	CCA	Order extending time to 8/31/87	7/27/87

No.	Court	Document	Date
15	CCA	State's Motion to Extend the Time for Filing the State's Brief	8/31/87
16	CCA	Order extending time to 10/15/87	9/1/87
17	CCA	State's Motion to Extend the Time for Filing the State's Brief	10/15/87
18	CCA	Order extending time to 10/25/87	10/15/87
19	CCA	Cover Letter for State's Brief (Not attached	10/23/87
20	CCA	Letter noting receipt of Court's order extending time to 1/27/88 and Order extending time	11/4/87
21	CCA	Letter, defense attorney, requesting oral argument	11/25/87
22	CCA	opinion, abating appeal	3/3/88
23	CCA	State's Motion for Rehearing (Seeking Modification of the Court's Order of Remand's Delivered March 3, 1988)	3/17/88
24	CCA	State's Motion for Leave to File MRH denied; abated to TC	4/27/88
25	CCA No-tice	Supplemental Statement of Facts was received and filed	7/5/89
26	CCA	opinion, Affirmed	9/16/92
27	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	10/8/92

No.	Court	Document	Date
28	CCA	Order extending time to 10/30/92	10/8/92
29	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	11/03/92
30	CCA	Order extending time to 11/30/92	11/3/92
31	CCA	Motion for Leave to File and Motion for Rehearing	11/30/92
32	CCA	Order extending time to 12/8/92	12/8/92
33	CCA	Mandate	2/5/93
34	CCA	Shuck Cover	
35	Crim Dist. Ct. No. 5, Dallas Cty	Modifying Execution Date	2/7/94
36	Crim Dist. Ct. No. 5, Dallas Cty	Order Modifying Execution Date and Appointing counsel	7/18/94
37	CCA	Order Modifying Execution Date	9/20/94
38	Crim Dist. Ct. No. 5, Dallas Cty	Order Setting Execution Date	10/5/2001

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire—agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show—the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will *want* to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines—if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror.

I. Purpose of Voir Dire.
   - A. Legal purpose.
     1. To qualify jurors on law regarding case.
     2. To become acquainted with veniremen so that you may use your strikes intelligently.
   - B. Tactical Purpose.
     1. Allow the veniremen to be impressed with you and your cause.
     2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

A. Look up and learn the law regarding the particular offense to be tried.
   1. List and remember the elements of the offense.
   2. Understand and remember any definitions of words of art applicable to the offense.

B. Be well acquainted with facts of your case.
   1. Learn what general law—will be applicable to the facts.
   2. Learn all weaknesses in the case in order to prepare the jury.

C. If you do not know the judge well, discuss Voir Dire with him in advance.
   1. It will allow you to know where you stand on questionable issues so that you will not be embarrassed in front of the panel by an adverse ruling.
   2. If the judge usually conducts Voir Dire himself, he may allow the lawyers to do it if adverse asked—this is always preferable.

III. What to look for in a juror.

A. Attitudes.
   1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.
   2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.
   3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.
   1. Look at the panel out in the hall before they are seated. You can often spot the show-offs and the liberals by how and to whom they are talking.

   2. Observe the veniremen as they walk into the courtroom.
      a. You can tell almost as much about a man by how he walks, as how he talks.
      b. Look for physical afflictions. These people usually sympathize with the accused.
   3. Dress.
      a. Conservatively, well dressed people are generally stable and good for the State.
      b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non—conformist and therefore a bad State's juror.
   4. Women.
      a. I don't like women jurors because I can't trust them.
      b. They do, however, make the best jurors in cases involving crimes against children.
      c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.
      d. Young women too often sympathize with the Defendant; old women wearing too much make—up are usually unstable, and therefore are bad State's jurors.
      e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.
   5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self—discipline and often times in stability. I like the lean and hungry look.
   6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.
8. Demeanor.
   a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.
   b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the venireman's reaction to you.

IV. Your approach to the jury panel.
   A. When the judge is talking to the panel.
      1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.
      2. Sit upright and have some eye contact with the panel.
   B. When you are talking to the jury panel.
      1. Stand upright and be as loose and at ease as possible.
      2. Stand close to the panel. The further you are away, the more distant seems the communication.
      3. Don't pace, but some movement may aid in keeping their attention.
      4. Use your notes as little as possible.
      5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.
   A. Introductory.
      1. Introduce yourself, tell your position, who you work for and who you represent.
      2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally

or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.

3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury—people that can be just as fair to the State as you *know* they will be to the Defendant.
   a. This approach makes it appear that the State is the underdog—most people will pull for the underdog.
   b. Reasons for briefly orienting the panel.
      (1) Most veniremen are ignorant of any specifics regarding the Courts and the legal procedures.
      (2) It gives the panel the feeling that you are trying to aid them.
4. Explain their duties as jurors.
   a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.
   b. The jury is to determine the facts of the case, the credibility of the witnesses, and the weight to be given their testimony.
      (1) The jury may believe all, any part of, or nothing that any witness says.
      (2) They may look to the witness demeanor motive or bias, reasonableness of what is said—using their common sense to guide them.
   c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they

may disbelieve one hundred witnesses in favor of the testimony of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury

a. All Defendants in a criminal case, no matter what they are charged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof—beyond a reasonable doubt.

Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness, and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying—what *he* has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to

prove, so when you present your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.
   a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.
   b. Circumstantial evidence.
      (1) Explain that it is a type of evidence , and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.
      (2) Give examples of circumstantial evidence.
5. Punishment.
   a. This is the most important qualifying issue.
      (1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.
      (2) A person weak on the maximum punishment will generally be weak on guilt.
   b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.
      (1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

      (2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.
      (3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.
   c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum—otherwise, you may lose your aura of extreme fairness.
   d. Probation.
      (1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.
      (2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.
      (3) On heavy cases such as murder, rape and robbery, etc:
         (aa) Explain that every Defendant, no matter what he is charged with falls within the probation law.
         (bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to *think* of a murder case where the Defendant may deserve probation, but if one *should* come along, and they thought it was the right thing to do, they could—vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc. stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any Particular sentence—it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually—this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self concious; the more at ease you are with them the more they will be at ease and honest with you.

4. Never give any indication to the panel as to whom you will strike.

5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).

6. Rate your venireman from one to five in the order of his desirability.

a. This will allow you to concentrate on the individual and his answers rather than writing.

b. If you want a record of their answers, have someone else in Court take notes.

7. In striking your lists be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the venireman individually.

1. Ask the length of residence in the county.
   a. People that move around very much are often unstable.
   b. If the venireman have not lived in the county long, ask where they were born and reared.
      (1) People from small towns and rural areas generally make good State's jurors.
      (2) People from the east or west coasts often make bad jurors.
2. Who their family consists of.
   a. People with a family are generally more responsible and therefore better jurors.
   b. If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.
3. Occupation.
   a. Ask a man "what is your profession or occupation?". Ask a woman "Are you employed outside the home?"
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self—made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.

         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, therefore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors.
   c. Working women.
      (1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.
      (2) Women working in retail sales often make good State's juror's.
   d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.
4. Ask if the venireman has any hobbies or interests that occupy their spare time.
   a. Active outdoors type hobbies indicate the best State's jurors.
   b. Hunters always make good State's jurors.
5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.
6. Ask veniremen their religious preference.
   a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.
   b. Lutherans and Church of Christ veniremen usually make good State's jurors.

c. Those that indicate that they have no religious preference are often non-conformists and bad State's jurors.

7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.
   a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.
   b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.
   c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.
8. Ask the veniremen if they have previously served on a criminal jury.
   a. Experienced jurors usually are better for the State than the inexperienced jurors.
   b. You may ask the veniremen anything about the prior case other than the verdict.

VOIR DIRE TRANSCRIPT EXCERPTS RE JURY SHUFFLE

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[6] jury panel shuffled?

MR. KINNE: No, Your Honor.

THE COURT: Does the defense wish a shuffle?

MR. CUNNINGHAM: Give us one minute, Judge.

MR. NELSON: We're going to change our election. We changed our decision.

THE COURT: I'm going to recess the jury panel to accomplish the shuffle for the State and let the lawyers attend to that.

MR. WEST: The State had already indicated they were not going to shuffle. I object.

THE COURT: I'll overrule. You still have your election. I'll overrule your objection and I'll recess the jury panel for you to accomplish the first shuffle and bring them back at 12:30. If the defense wants a shuffle, we'll do that and I'll go ahead with the **[7]** next shuffle.

(Whereupon, the following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Ladies and gentlemen of the jury panel, a procedural matter came up that I needed to attend to. Many of you must be wondering about lunch, if you're going to get to eat. I'm going to recess you—all until 12:45. That is only an hour and five minutes. It will be crowded downstairs and there will probably be a line.

Since I have not started any part of voir dire, let me give you these instructions: Since you have been called up as a prospective jury panel in the case entitled the State of Texas versus Thomas Joe Miller-El—he is—the man in the blue that looks like a leisure suit-you-all should not **[8]** and may not discuss his case or anything you might know or think you may hear about it. There should not be any conversation about it. If someone talks about the case in your presence, anyone says anything in your presence about

Thomas Joe Miller-El, tell them you're on a jury panel and the Judge has instructed you not to talk about it. I don't think anyone will, but if they do, let me know.

When you come back at 12:45, we may change the order that you're seated in, so stay out in the hall and we'll call you in. Thank you, folks.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held out of the presence and hearing of the jury panel.)

MR. WEST: Your Honor, we **[9]** will shuffle.

THE COURT: What I'm going to do is—this shuffle is granted—I'm going to go ahead and do general voir dire and ask the jurors to take the questionnaires and complete them so we can accomplish that much since this is the last shuffle that we'll have.

(Whereupon, the following' proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Good afternoon, ladies and gentlemen.

Welcome back. Let me start out with what I have to say by giving you some general information, I did not give you much information this morning before I recessed you because, at that time, I wasn't prepared to go forward with any more of this part of the voir dire.

* * * *

[15] been returned to us, we then—I will assign some sort of order or schedule of jurors that we'll talk to one by one. I hope to do at least one this afternoon. Probably the first juror over here will be number one. I don't know who will be number one at that time, but be that as it may, somebody will be the first juror to start out with. If we can keep a schedule, and I think we can after the bumpiness of today, were going to talk to as many as six a day. As slow as that may sound, that is not slow. If we can do six a day, we will have accomplished a lot.

So very candidly, anyone who, when we start our selection process, is beyond the first two rows is probably not go-

ing to be reached at all to be talked to. We will talk to you one at a time. The purpose of that is very **[16]** simple. It allows the lawyers and the Court and you to have very important direct one-on-one contact which, in this kind of case, we find very vital and very necessary.

I know that many of you—all are wondering to yourself, well, they told me downstairs this morning that it would be one day or one jury. Well, let me tell you a little bit about our schedule. We hope—we being all the lawyers and I—that this jury selection process will be completed within a month. We expect it will take at least four weeks including this week. You will discharge the initial part of your jury duty by coming for your individual questions probably one day this week. If you're not reached this week on the list, then you're discharged from any further service in this case. We **[17]** will start out with a new panel next Monday to get fifty more people up here and start out with the same process. We'll do that every Monday until we select a jury.

If you're not on the jury and you're not reached at all or, if you are reached and you're on the jury or excused, then you're through, your service has been discharged. If you are selected as one of the jurors—and obviously this group would provide one of our early members or several early members, hopefully—then you would be sworn in and given a date which we expect to start the trial. You would be called back when all twelve jurors are selected and the alternates that we decide to select and the case will be started.

The case, the lawyers tell me, itself will probably take

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[658] third one depending on what the evidence shows. What Mr. Macaluso was asking and I think what Mr. Cunningham asked, the same question, if it was, if the evidence shows beyond a reasonable doubt that the answer to number one should be yes and number two should be yes, that you would have to answer yes., What you said is, you would not want to be put in that position by having taken the oath initially because you could not answer yes to those based on your understanding that would result in the Defendant be-

ing assessed by the Court, not by you but by the Court, the death penalty? That's sort of a convoluted question, but is that—

MR. NELSON: That is, in effect, what I said, yes, sir.

THE COURT: All right. Now, I think something else that you

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[773] The time that he committed the offense cannot be convicted of the offense of murder because he was insane. Do you agree with that, sir?

A. Did I understand you to say, if someone were proven insane at the time?

Q. Yes, sir. In other words, if the insanity defense is raised by the accused and that fact is established by a preponderance of the evidence, then the law says that person is excused because of the fact that he was insane.

A Yes.

Q. Therefore, he's not guity of the intentional and knowing taking of another person's life because he did not have his mental capacity to do it. He didn't know what he was doing. Do you agree with that, sir?

A. Yes.

Q. Also, the law says, when you get into involuntary manslaughter, a person is not guiltyof murder. So we are taking all these and leaving nothing but where a person intentionally kills another person. He knows that he's killing him and there is no justification, no excuse whatsoever. In that instance—

[774] Mr. MACALUSO: Excuse me, Your Honor, I don't mean to—pardon, me MR Cunningham. I believe the statement was made that there is no excuse whatsoever. No legal excuse I think would be the proper phrase. There may be all sorts of considerations or excuses, but no legal excuse.

THE COURT: Your point is made. Do you understand that, Mr. Wagoner, that the law does justify and excuse certain kinds of killings. Mr. Cunningham has mentioned several situations, if you're insane, self—defense, an accident. For example, even though he may have intentionally or knowingly caused the death of somebody, which would be murder ordinarily, if you did it while you were insane or self—defense, then the law justifies or excuses you in those situations. I think **[775]** that's what Mr. Cunningham is talking about. There my be a lot of other reasons, so there's a difference. Do you understand?

Mr. WAGONER: I understood that what the gentleman has just asked me, in my mind is it a legal reason, is it a law, that says that this—things that might be asked by a lawyer, if its' a law, is there an excuse written in the law that would protect—I use the word protect—the individual or be excusable for this individual for that particular thing. Did I answer to your question to your satisfaction?

Q. Yes, sir. You've indicated that you served on a kidnapping case. Did the jury reach a verdict in that kidnapping case?

A. Yes, we did.

Q. In the robbery case, did the jury reach a verdict?

A. They were connected together.

Q. In other words, you heard evidence **[776]** on the kidnapping one day and then evidence on the robbery case the next day?

A. It was three days or four altogether and they were combined.

Q. You went out and decided whether or not he was guilty of kidnapping and after resolving that issue, you went out and decided whether or not he committed the robbery?

A. Yes.

Q. And you—all were able to reach a verdict?

A. We did.

Q. Did any of the district attorneys talk with you after the case was over with?

A. No. I say no. I asked one of them a question on my own after it was all completely over with.

Q. Was that about what sentence he would receive?

A. No.

Q. About something that happened during the trial?

A. No. I just wondered who paid both lawyers. I asked him that question. I don't know why I did, but I did ask the question. It

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[842] on our list. That last juror then would be Ms. Hernandez.

Now, let me give two sets of instructions, ladies and gentlemen. First of all, good or bad news, I'm not sure how it's going to be taken. From Ms. Freeman on to the end of that row, which would be Ms. Freeman, Ms. Bradford, Mr. Gossett, Mr. Smith and Mr. Melton, and all of the back row will be excused from jury service in this courtroom at this time and the central jury room asked me to return you to them so they could see if they're going to need you for something else. I don't know whether they do or not, but you—all will not be voir dired in this case. There's no sense in tying your time up at this time with what I'm getting ready to finish with the panel I'm retaining

I appreciate your patience

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[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A. Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when the were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tired for capital murder for hiring him and he could be tried for doing **[1530]** the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if your murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you feel those are the types of cases, generally speaking, where you feel the death genalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, things that you mentioned earlier, do you feel, for example, a murder during a robbery where a person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you had a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A. Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A. No, I've never—you know just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-case basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it **[1532]** serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some case you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, **[1533]** but sometimes, you know, you feel maybe

this is not really punishing the person to give him the death penalty.

Q. It's over?

A. Yes, it's over and you know, they're not really suffering from it.

Q. Let me ask you this: You're a married man, aren't you?

A. Yes sir.

Q. Do you know or would you hazarded a guess how your wife feels about the death penalty?

A. No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, if I had to guess, I would say probably it would depend on the situation.

Q You've got three children, is that right, sir?

A Yes, I have.

Q On of them is grown, though. **[1534]** Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that as well?

A. Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury might hear more evidence and they might **[1535]** not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agreed to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, if you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trail—after you've heard all of the evidence, the Judge will give you two or three question to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should be answered yes, you answer **[1536]** them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A. No.

Q If we don't then you, as a juror, are required to answer the question no. could you do that, as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the

Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it could you do that?

A Yes, I could.

Q All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agrees with you or disagrees **[1537]** with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect t the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all

A No.

Q The first one, I think, is pretty much self—explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you can hear facts that convince you that be acted with the reasonable expectation that someone would die, **[1538]** you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that-words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self—defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that

* * * *

[1777] back this afternoon. Folks, thank you again for your patience. See you this week.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held.)

THE COURT: Well, on the record now that everybody is back including the Defendant, of course. Mr. Nelson, does the State have a question?

MR NELSON: Judge, our position is basically this: at the time of the second shuffle this morning when Mr. West and I went to the central jury room and shuffled, Mr. West had put the cards in the basket and started to pick them out and I said at that point, "Why don't you shuffle them a little bit more. I think we need to shuffle a little bit more." Or something like that. My **[1778]** recall is that Mr. West's comment at that time was, "Well, just take it up with the Court." That's what I'm attempting to do at this time.

My understanding that a reason for the shuffle is to completely rearrange or randomly select again the array in

the seating of the jury. We have—I don't know the exact figures.

Some people checked on it before me, but we have a large number of persons who didn't change position at all from the second list to the third list. We have sixteen in a row at one point and at another point ten in a row with only one person in between those groups.

Basically what we're saying is, Judge, that we have sixteen in a row and ten in a row with one in between and then six in a row. Although those things can happen, the State's position is, under the **[1779]** Latham case, shuffles are to be done in the courtroom unless it is otherwise agreed by the parties. We had that agreement up to the point where I objected to Mr. West's procedure down in central jury room and therefore, we would ask the court to hold that this shuffle was not correctly done and to either reshuffle the panel, the Court itself, or the clerk as directed by the case law and statute in this case or to quash this panel and we will begin with a new panel at the earliest possible time.

MR. CUNNINGHAM: Jim, could I ask you just one question?

MR. NELSON: Sure.

MR CUNNINGHAM: That was a first shuffle; is that correct?

MR. NELSON: That's correct.

MR. CUNNINGHAM: And you went down and shuffled on behalf of the State?

[1780] MR. NELSON: With Mr. West there.

MR. CUNNINGHAM: With Royce standing there?

MR NELSON: Right.

MR. CUNNINGHAM: And he didn't say anything about the way you did whatever you did?

MR. NELSON: No he did not.

MR. CUNNINGHAM: And then you cam back up here.

The Jury panel was seated?

MR NELSON: No. The second time they were not seated.

MR. CUNNINGHAM: I'm talking about the first time, We came back up and we looked at the list and then we said we wanted to a shuffle right?

MR. NELSON: Before they were seated again.

MR. CUNNINGHAM: Then you went back down and there was a second shuffle?

MR. NELSON: That's when the **[1781]** events took place.

MR. CUNNINGHAM: Okay. But the State had received its shuffle?

MR. NELSON: Correct.

MR CUNNINGHAM: Okay. You then had some conversation with Royce and said you were going to take it up with the Court?

MR. NELSON: Well, I suggested that they may need to be shuffled some more and Mr. West say to take it up with the Court.

MR. CUNNINGHAM: Then we came up and went into the Judge's chambers, all four of us were in the Judge's chambers—

MR. WEST: We will waive the oath.

MR. NELSON: [text _____]

MR. CUNNINGHAM: We will waive it, but everything you said, you're saying as an officer of the court?

[1782] MR. NELSON: Yes, that's correct. If Mr. West disagrees with anything I've said as far as the conversation or anything, then—

MR. CUNNINGHAM: Then all four lawyers, with the Judge, went back into his chambers and you—all were talking about this matter?

MR. NELSON: Correct.

MR. CUNNINGHAM: At that time you did not say, "Judge we object to the manner in which Mr. Royce West shuffled the jury"?

MR. NELSON: That's correct. What was said at that time was, I had some people checking on some things and I wasn't finished checking.

MR. CUNNINGHAM: You did not tell the Judge, "We object and we don't want to go any further right now"; is that true?

MR. NELSON: No, I didn't use those exact words.

[1783] MR. CUNNINGHAM: Then we came back out and the panel was seated again. The questionnaires were taken up and then the Judge started giving his instructions?

MR. NELSON: Correct.

MR. CUNNINGHAM: He excused sixteen jurors and you did not object to his excusing sixteen, is that correct?

MR. NELSON: The sixteen were excused.

MR. CUNNINGHAM: From the back row only?

MR. NELSON: Yes.

MR. CUNNINGHAM: Then after the Judge's instructions, he told everybody what time he wanted them back all of that and up to the point, you had not told the judge, " we object to this panel and we either want it reshuffled or we want the panel quashed"?

MR. NELSON: No, I had not said those words, but I had told **[1784]** the Judge that we had—that it might be a problem and that I was investigating it further. I believe the Court will recall that I informed the Court of that before the Court did his general voir dire.

MR. CUNNINGHAM: The week of February 3, the jury panel was seated. The State requested a shuffle. You and Mr. West went downstairs. You shuffled; is that correct?

MR. NELSON: This procedure has been followed.

MR. CUNNINGHAM: The weeks of February 3 and the week of February 11th, the same procedure that we did today?

MR. NELSON: Yes; but without objection from either side.

MR. CUNNINGHAM: In other words, you were familiar with thirty—five, forty, eleven; that **[1785]** they were supposed to be shuffled down and you did not object the week of February 3 or the week of February 10th and today until after you had gotten your shuffle and Mr. West had gone down and shuffled and then you objected or you said you were going to take it up with the judge; is that correct?

MR NELSON: I made the comment to Mr. West while the second shuffle was going on. I don't know what words I used, but I indicated a disagreement and Mr. West's comment was to take it up with the Court and I think that's probably all that was said on the subject.

MR. CUNNINGHAM: And this was supposed to have been the defense's shuffle?

MR. NELSON: It was one done at the defense's request, yes.

MR. CUNNINGHAM: That's all, **[1786]** Your Honor.

MR. WEST: Your Honor, my recollection of the incident was basically somewhat as Mr. Nelson has represented to the Court. No, I didn't say anything concerning the procedure that was used by Mr. Nelson. I haven't said anything for the past three weeks. I've used basically the same procedure.

Now, the State is saying at this point in time that, for some reason, the defense has done something with the panel in reference to placing them in some particular order.

MR. NELSON: Judge, I never said that. What I'm saying is, we feel that they should have been shuffled more thoroughly than they were.

MR. WEST: Judge, the fact of the matter is, it was the defense's shuffle at that point in time. MR. NELSON could have done **[1787]** what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it

done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

MR CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number **[1788]** nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the **[1789]** defense puts cards in or takes them out. I didn't try to dictate it at the time that he did it and he can't do it when I do it. Now, the facet of the matter is—and I'm putting it on the record—that for the last three weeks—specifically the week of the 10th we had black jurors on the front that the State immediately did a shuffle. They have a right to do that. The law provides for that. Both sides can shuffle.

Four jurors come up here the week of the 17th and they're black. They shuffle them with the jurors in the same order after his shuffle and they end up on the back row in the same order. Now, he's crying about the jurors after the defense does their shuffle that they're back on the first row.

They can sit as jurors. If they're qualified as jurors to sit in this particular case, then they **[1790]** should be able to do it without regards to race.

MR NELSON: Judge, at this point, if the defense wants to have it marked, they can have it marked, but Mr. Shipman prepared a chart of the differences between the second list and the third list which indicates the very minimal amount of shuffling that resulted this time and that's what I'm saying is, they were not shuffled as thoroughly as they should have been. If the Court would like Mr. Shipman to explain the chart or go over the chart with the Court, he can. I think it will make our position fairly clear.

THE COURT: Well, you—all can put anything that you want to into the record, Mr. Nelson, but I don't believe the Court has any authority at this time to order a reshuffling or to the quash this panel based on what I've heard, so I'm **[1791]** going to go with—

MR. NELSON: But under the Latham case, Judge, the only way the shuffle can be done the way it's been done the last two weeks and today is with the agreement of both parties.

THE COURT: I agree. That's the law.

MR. NELSON: The State has submitted that at the time I objected to Mr. West's procedure that terminated the agreement of both parties. Therefore, that shuffle is void and should be reconducted.

MR. CUNINGHAM: That might be all right except—

MR. WEST: He just said, "Don't you think you should shuffle them some more?

MR. CUNNINGHAM: Secondly, he's already gotten his shuffle. That's basically unfair

MR. MACALUSO: Well, Judge, **[1792]** if I understood Mr. West; is he saying at the time a particular side requests a shuffle, that side has complete control over the procedure of the shuffle? I need to be corrected on that, so there's no confusion in the future.

THE COURT: There won't be any confusion in the future. Next week; if we have any problems, I'm going to require that it be going to require that it be brought up here to the Court and the shuffle or whatever it may be be conducted in the presence of the Court, so if either side has an objection at that moment in time, it can voice it to the Court on the record and I can decide whether the shuffle was properly done or not. It won't happen again, I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to **[1793]** do it in the manner in which it was done in this case, so this is not something that has happened every time we have a jury shuffle. I'm sorry it didn't work out in this case.

MR. NELSON: I think my problem is, maybe you objected; but you didn't object promptly enough to cause me to stop the procedure when I could have stopped it and now I do not believe I can order a reshuffle,

MR. NELSON: I thought that I told the Court that we had a problem and there was some question about it and the Court indicated at that point that you wanted to go ahead and do the general voir dire anyway for time purposes by other persons checking on the situation. I thought we agreed with that understanding and that's why we did the general voir dire.

[1794] MR. WEST: Judge when did Mr. Nelson bring this to the Court's attention?

MR. NELSON: When all of us were back there before the general voir dire.

MR. WEST: Well; Judge; it was my understanding that the Court called all the attorneys into the clerk's office and asked if there was some sort of problem and Mr. Nelson said at that point in time, "I shuffled." and turned around and said that I had shuffled, There was no indication that there was a problem at that time.

THE COURT: The problem, Mr. Nelson; is, you didn't—you said, as I recall, that you weren't satisfied with the way the shuffle had been conducted or something like that, but

you didn't object to the location. That's what you're objecting to **[1795]** now. I'm going to have to overrule the State's object-tion on this. Next week it will not be done this way. We'll go with the list that you've got for better or for worse.

Let's bring Mr. Rand in. Mr. Rand, how are you doing?

MR. RAND: Fine, sir.

THE COURT: Mr. Rand, I'll ask you, as much as possible to make yourself comfortable it may not be possible under the circumstances, but if you can just do that, we would appreciate it, and answer the questions as I know you will Mr. Macaluso, go ahead.

MR. MACALUSO: Mr. Nelson is going to talk Mr. Rand, Judge.

* * * *

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RODERICK R. BOZEMAN,

[273] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Kinne. He was seated over here to—it would have been your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

[274] MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-El. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case. Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-El is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense. Okay?

As you well know, if a person is convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit

nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. Will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. I want to let you know that from the very outset so you know exactly where we stand and what our position is going to be with regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death.

Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective jurors, what our position is so it wouldn't come to you as any surprise if you're actually on the jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up.

Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actually vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it would depend on the facts and circumstances, but as a general [280] proposition, how do you view the death penalty, how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really. It would, I **[281]** guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the situation called for it, could actually make a decision that would result in someone **[282]** actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they

could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you' re not in the third category, but do you see yourself in either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like **[283]** I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you can answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you **[284]** understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or "Maybe I could do that." and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into [286] any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years ago has no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now, in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-El, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, all right? But not all murders—murder is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered—if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you.

All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at.

A Yes.

Q —or if you kill a jail guard or kill someone while you're escaping from a penal institution, a jail or penitentiary, things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. If you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then

elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the second part of the trial. You may hear additional

evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the **[292]** basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the answers to three questions that you're called upon to answer and, you see, the law requires the Judge to take an automatic and mandatory course of action. Am I making myself clear?

[293] A Yes.

Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a

letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He **[294]** will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bowman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the **[295]** evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think **[296]** that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after **[297]** a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't care less?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if **[298]** you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you. It depends on whether or not some evidence is raised by any kind of provocation. Can you see **[299]** how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, **[300]** measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, a personal desire that the person would die or—a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're

on a jury and you say, "Well, I think the guy ought, to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and **[301]** not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or **[302]** quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a per-

son—you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying, that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any **[303]** reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut—wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's **[304]** outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. If any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonably, that anyone would understand would be on the situation when you're making a

life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last **[305]** statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one, that he would **[306]** do that.

The same thing for number two and the same thing for number three.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and—talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're **[307]** on a capital murder jury and let's say it's a capital murder that is allegedly a murder during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to **[308]** occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the

law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that **[309]** you acted in self—defense or I did. Do you see?

A Right.

Q Forget about self—defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self—defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like **[310]** that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum **[311]** punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life .

MR. MACALUSO: I intend to do that, judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation

where a person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I **[313]** can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do here?" or "What would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you **[314]** do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-defense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the death, you know, that really it was indirectly. It was his

fault, but he didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that he could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I **[316]** did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you feel you could not be a fair and impartial juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge **[317]** covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr.' Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?

A Cam Audio.

Q How long were you with Cam Audio?

A I was with them a year.

Q Are you still attending college?

A No, I'm out right now.

Q That is at Denton, the University of Texas—no, North Texas State University? A Right.

Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?

A Yes.

[319] Q Every day?

A Yes.

Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?

A No, I haven't.

Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?

A Yes.

Q You could do that if chosen as a juror, sir?

A Yes.

Q The same thing would apply to radio or TV?

A Right.

Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?

A I have a cousin in Los Angeles who **[320]** works for the DA's office.

Q Do you communicate with your cousin in Los Angeles?

A No. I haven't for a few years.

Q Does he try criminal cases or civil cases or do you know?

A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?

A Joleen Harkess.

Q When is the last time you saw her?

A Oh, it's been about six or seven years at a family reunion in Longview.

Q And the person that studied sociology is that you?

A Yes.

Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?

A Yes.

Q And whatever you may have read or heard, either on the TV or the radio or in the **[321]** papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and evidence that you hear?

A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did and what the defense did. Mr. Macaluso, the juror has been **[322]** qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and, according to the juror's sheet, he's twenty—eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the **[323]** defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able **[324]** to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in .this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the **[325]** questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[397] BILLY JEAN FIELDS,

called as a jury panel member, having been dull sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by Judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q The reason why I've reintroduced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

[399] Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers **[401]** critiqueing everything you have to say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't, I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We just want to know how you feel and, in some instances, how you feel about certain things. Okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by **[402]** all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two possible penalties. One is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-El. The only reason I tell you that is, is to be fair to you and put you on notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have **[403]** one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt

whatsoever that Mr. Miller-El is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant to be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, of course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to **[404]** this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to the way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service,

the State represents Him if the crime has been **[405]** committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time.

Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular **[406]** purpose?

Q Do you think the death penalty or the imposition of the death penalty; do you think that serves a purpose?

A Yes.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a deterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty—six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned.

The death penalty in Texas, at least, is reserved for murder—type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of **[409]** another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murders, you know, a string of murders in one situation, or if you hire yourself out. There are other areas, but **[410]** basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make

the decision that could result in the execution .of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?

[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial,you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more **[413]** testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. Now, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made **[414]** the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you—can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily **[415]** agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer one or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State—has the burden of proof in both parts of the trial. We brought the indictment. We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you **[416]** answer the questions no. Any problem with that at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming—let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and the other jurors agree that the Defendant is guilty. Let's just assume that imaginary case, okay? You've heard all the evidence in the second part of the **[417]** trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh, it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say **[418]** intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, knifing somebody, whatever it may have been—and I'm not talking about this case, you understand. I'm just talking about an example, a hypothetical example—was that done with the reasonable expectation that someone was going to die. Can you see how you can answer that question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr. **[419]** Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding

whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that, if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in **[421]** either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't have that information to assist you. Let me ask you this, Mr. Fields; Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have

to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? Was he subservient or was he. active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be farfetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but also it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The word is not used there. **[425]** Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—and we're not talking about Mr. Miller-F. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. How would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the **[426]** jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to convict somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on **[428]** this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self-defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or 'insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes **[430]** home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but ex-

cluding those things that we did discuss, excluding self defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly **[432]** or intentionally kills another person and it wasn't in self-defense because that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your personal feeling, is that correct?

A Yes.

Q Now, let me explain, but it's not to argue with you or quarrel with I'm not going to do that. The range of under the laws of Texas for the offense of murder is not less than five years nor more than 99 years or life, depending upon the facts of a murder case, but still bear in mind excluding those four things I described to you. I'm not talking about any of those. I gather from what you're saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self- **[433]** defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I think the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I

feel about it personally or how did I feel about it in regards to how the **[434]** law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninety-nine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken

from them, whatever the case may be. There may be one survivor to whatever offense it is. The law **[435]** says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on **[436]** number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not—be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you **[437]** very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twenty-four years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church?

A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is **[440]** located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church?

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society?

A For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have holy days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes, sir. The 700 Club on—which is—

Q How long—have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as **[442]** evidence?

A Right.

Q Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men)" in parentheses.

Q You indicated that you had received a ticket once and you felt that it **[443]** wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q Was anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you have a friend that was mugged would not affect your decision, if you're chosen as a juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, **[444]** that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a fair and impartial juror other than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out **[445]** in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I can go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether **[446]** or not there was any reason why he could not be a fair and impartial juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr.

Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is going to happen, obviously. I would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying **[447]** to play word games here, but I did overlook asking that question and I think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-El, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he **[448]** has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr.

Macaluso and Mr. Nelson, and ask you—all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise **[449]** a preemptory challenge, Your Honor. I want to ask the Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential schedule of this case is and ask them if **[450]** there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposes.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he **[451]** later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case. Those are our reasons for exercising our preemptory strike at this time.

MR. CUNNINGHAM: Your Honor, we would object—we would say, the defense would say, that the reason just given by the State for their exercise of their second preemptory challenge is a farce and that this juror was explicit both on his questionnaire and in answer to Mr. Macaluso about in the proper case and under the proper facts and circumstances that he could and would give the death penalty. He also expressed the fact that he was a deeply religious man and that is shown by his questionnaire and by the **[452]** information I elucidated from him and that there is nothing wrong with the fact of a person believing that every individual can be rehabilitated and that in no way conflicts with his belief that in the proper case and under the proper facts and circumstances, he could render a verdict answering the three questions, that are required by 37.071, yes if the evidence showed that and, Your Honor, there is no conflict and there was no conflict and the State had an opportunity to go into as much detail as it wanted to develop whether or not there was a conflict and, after all the examination by the State, there was no conflict shown.

Your Honor, for the purposes of the record, we would also—we want to offer the questionnaire that was filled out by Mr. Fields as an exhibit in this case, both **[453]** the one that the State had and the one that the defense has.

THE COURT: Well, the Court has one, too. I'll admit it—I'll give the State a chance to object to it. I'm sorry. I'm being a little presumptuous.

MR. NELSON: Excuse me, Judge. It's just for record purposes?

THE COURT: Right. I'm assuming it's just for record purposes?

MR. CUNNINGHAM: Yes.

THE COURT: I would offer to either side—I was going to say, if you—all wanted to, for appellate purposes, let the record reflect some of his answers on the questionnaire having to do with whatever, the number of children, that you could offer the questionnaire because it was given under

oath. The juror was sworn prior to the time he filled [sic] this **[454]** out.

MR. MACALUSO: The Court is going to attach his own?

THE COURT: I'll attach my own or a copy of my own because you-all may have marked on your and mine is not marked on

MR. NELSON: With reference to that, Judge, we would call attention to the fact that Mr. Fields' brother has been convicted of a felony and --

MR. WEST: Your Honor --

MR. NELSON: Excuse me, Mr. West --

MR. WEST: Well, the Court asked for objections and I'm asking to make a legal objection.

THE COURT: We're just making the record now. I assume there is no objection to that:

MR. NELSON: No, not for record purposes.

MR. WEST: For purposes of the record, Mr. Bozeman's and Mr. **[455]** Fields' questionnaires?

THE COURT: Yes.

MR. MACALUSO: The Court is going to admit, for record purposes, Mr. Bozeman and Mr. Fields?

MR. WEST: And Mr. Fields.

MR. MACALUSO: I have no objection to that.

MR. WEST: Excuse me, Mr. Nelson—

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: I just wanted to make sure the record is clear that I said we would like to call attention to the fact that his brother has been convicted of a felony prior to this, also, which is another consideration to the State's decision.

MR. CUNNINGHAM: Your Honor, there is no evidence that he was convicted of a felony.

MR. NELSON: All right. He **[456]** says he's been convicted of an offense and did time. The record will speak for itself on that, also.

MR. CUNNINGHAM: I think that, if he had been convicted of a felony, then he would have been disqualified—

MR. NELSON: His brother. His brother.

MR. CUNNINGHAM: I'm talking about his brother. That's the one you said was convicted of a felony?

MR. NELSON: Right.

MR. CUNNINGHAM: If he was convicted of a felony of possession of a controlled substance, then he would not be qualified and he never would have gotten up here and have been on this jury.

MR. NELSON: His brother.

MR. CUNNINGHAM: I'm talking about his brother.

[457] MR. NELSON: The fact that his brother was convicted doesn't disqualify him, as a matter of law, Brice.

MR. CUNNINGHAM: Oh, okay. Excuse me.

THE COURT: Let's bring Mr. Fields back in.

(Whereupon, Mr. Fields returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Fields, just come back up here in front of the bench, sir, if you would. Sir, you've been excused from any service in this case and I want to tell you that we appreciate your attendance and your patience with us and your very candid answers to the questions. When you're excused, you can give your badge to the bailiff. A question came up in my mind, because of your job, that you might have some **[458]** vacation coming. Would that have interfered with your service in this case?

MR. FIELDS: I'm on vacation this week.

THE COURT: You're on vacation right now?

MR. FIELDS: We have jury duty time.

THE COURT: So you get credit. You don't get docked?

MR. FIELDS: No.

THE COURT: You don't get docked for serving on a jury and you still get your vacation?

MR. FIELDS: Right.

THE COURT: Off the record.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

THE COURT: This is number ten. Mr. Riddle, first of all, I apologize to you for the delay. We've got people scheduled here

* * * *

[1519] JOE A. WARREN,

called as a Jury, panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor; and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q When the trial begins, we will be joined by Norman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracted the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got the Chicken Pox and we'll probably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAH: How are you, Mr. Warren?

MR. WARREN: Fine, sir.

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good afternoon.

Q You may recall that they are the defense attorneys who have been appointed by His Honor, Judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-El. He's in the powder blue suit and you may be able to see him form where you're sitting. He's charged with capital murdér. The reason I've taken time to, reintroduce everyone here is to reacquaint you with the roles we play, who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A No. I've probably seen each of you.

Q **[1521]** Going down the halls of something like that?

A Yes.

Q You don't know anything about this case, do you?

A Not that I can recall.

Q As you well know, Mr. Warren, you are a prospective juror in this case We have two jurors, but one is kind of iffy because they may have a medical problem. Basically we have two jurors, but we need ten more before we can start. We've talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have two jurors; so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know the Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state it's obviously serious because of the nature of the offense.

[1522] It involves a capital murder. It's serious because of the two possible penalties. You may recall that the Judge told you that a person who is convicted of capital murder can receive only one of two possible penalties. One is a manda-mandatory sentence of death by lethal injection of a drug that would kill him or a sentence of life, okay, in the Texas Department of Corrections. One of the other and there's no in between.

Now, because of the very serious nature of what we're about here, the law allows us to talk to you individually. Ordinarily -- have you been down here for juy duty before?

A. Yes, I have.

Q. Did the lawyers talk to you?

A. Yes, they did.

Q. In front of everyone else, didn't they?

A. Yes, they did.

Q. That can be kind of inhibiting, you know, if -- we're going to be asking you some personal questions. You know, some of these questions we've asked you here are of a personal nature on the questionnaire. When **[1523]** you're expected to answer up in front of forty or fifty strangers, maybe you would be less inclined to be open and speak your

mind as you would in this semi-private atmosphere that we have here and maybe you'll be a little bit less nervous. I know I would probably be very nervous if I were up there being asked questions by a bunch of strangers. Let me invite you to relax as much as you can. You don't look too nervous to me.

Let me remind you that there are no wrong answers to any of the questions I'm going to be asking you. There are no right answers, either. You just tell us what is on your mind. If we ask the right questions and you're honest with us, which I'm sure you will be, you'll be doing your job and we'll be doing our job and this whole thing will get accomplished, okay?

A. Sure.

Q. Let me tell you also that no one is going to try to talk you into something or out of something. No one is going to argue with you, quarrel with you, criticize your opinions or anything else like that. Just tell **[1524]** us what's on your mind. Sir, if you have a question about anything, then by all mans ask it. If there is something that you wish to add or something you want to tell us, this is the time to do it because, you see, if you're on this jury, number one, we have to rely on what you say now to decide whether or not you're qualified and suited for this type of jury. Number two, we have to rely on what you tell us now because, if something occurs to you later and you want to ask a question, you can't do that.

Now, let me tell you what our position is in the particular case, Mr. Warren. The State of Texas in this particular case is actively seeking the death penalty for Thomas Joe Miller-El. In other words, we intend, once the trial begins, to provide a jury with the type and quality of evidence that would convince this jury -- and that would mean you, obviously, if you're on the jury -- beyond a reasonable doubt that Mr. Miller-El is guilty of capital murder exactly as he is charged in this document, the indictment. That's done in the first part of the trial.

In the second part of the trial, we intend to be able to prove the same jury with the type and the qualify of evidence that would require them to answer three questions yes. In other words, all yes answers, as you know, would require the Judge to assess a sentence of death for Mr. Miller-El. The reason I say that is, is to be straight forward with you and lay our cards on the table and tell you where we stand right from the outset, that we intend to actively seek the death penalty in this case for this man here in this courtroom. You understand that our position is just that. It's just our position I'm sure that other lawyers have a position that may be contrary to that -- or we could assume that. Ultimately, what really counts is what the jury decides on the evidence. Okay?

A. Sure.

Q. Now, Mr. Warren, you were asked this question here and I want to just let you speak a little bit yourself now, let you do some talking, and I'll shut up for awhile. Why don't you just tell us, if you would, in your own words, sir, how you feel generally about **[1526]** the death pen[illegible], capital punishment, and then, sir, your ability or your inability to actually serve on this type of case where the death penalty is a consideration?

A. My personal position on the death penalty, there are some cases where I would agree, you know, and there are others that I don't.

Q. For example, what sorts of cases do you feel the death penalty is warranted in, what sorts of things come to your mind?

A. Well, I suppose where maybe things happen that could have been avoided. Maybe some cases like that, I would agree.

Q. Where someone kind of gets caught up in something maybe?

A. Maybe, you know, if there was some other way out, then I would assume -- I would think maybe they could have done something different or something.

Q. Where someone had a choice to kill or not to kill; is that correct?

A. I would say he had a choice, yes.

Q. Right. He had a choice. His didn't have to do what he did, let's say, but **[1527]** he went ahead and killed anyway is that right?

A Yes.

Q I gather you feel very strongly about human life, I gather, in that regard?

A Sure.

Q We're talking about murder?

A Yes.

Q What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?

A I would say in some cases, if you were—in selfdefense sometimes, then I would say no.

Q Let me talk a little bit about murder and capital murder. First off, you can only receiver the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death

penalty for rape and you could get the death penalty for armed robbery and some other offenses, I think. But under the **[1528]** law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though the law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've described it, is not a capital offense. It is not an offense for which a person, under the laws of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Mr. Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A Yes

Q All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when there were six or seven people in killed in a bar about two years ago?

A Yes.

Q That could be capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tried for capital murder for hiring him and he could be tried for doing **[1530]** the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in the indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A Yes, sir.

Q We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you feel those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a **[1531]** person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A I think if you had a choice, you know.

Q Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A No, I've never—you know, just as far as generally speaking, I've never.

Q You feel it's proper on a case-by-case basis; is that right?

A That's the way I look at it, depending on the individual case.

Q Let me ask you: Do you see it **[1532]** serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q What do you think it accomplishes when you feel it does?

A I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, **[1533]** but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q It's over?

A Yes, it's over and, you know, they're not really suffering from it.

Q Let me ask you this: You're a married man, aren't you?

A Yes, sir.

Q Do you know or would you hazard a guess how your wife feels about the death penalty?

A No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have feelings. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, it I had to guess, I would say probably it would depend on the situation.

Q You've got three children; is that right, sir?

A Yes, I have.

Q On [sic] of them is grown, though. **[1534]** Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that as well?

A Yes.

Q Just call it the way you see it. That's all that would be expected. Now, in the second part of the trial under the old law, the jury hear more evidence and they might **[1535]** not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence of some

number of years. If you [sic] someone ought to die for what you heard and the others agreed to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, it you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trial—after you've heard all of the evidence, the Judge will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they proved they should be answered yes, you answer **[1536]** them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A No.

Q If we don't, then you, as a juror, are required to answer the question no. Could you do that as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it. Could you do that?

A Yes, I could.

Q All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agrees with you or disagrees **[1537]** with you, you'll never know anyway because he's not going to say that, what his feelings are. With

all due respect to the Court, he's not in the position to tell you whether he agrees or disagrees. Now, you said you could [sic] that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all?

A No.

Q The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with reasonable expectation that someone would die, **[1538]** you answer the question yes. If you don't, you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape, robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean

what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up [sic] necessarily agree with that?

A I suppose there's always that **[1539]** chance, but there again, you never know.

Q Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A Based on the evidence, I would answer it accordingly.

Q Let me ask you this, Mr. Warren: Could you share with us what you feel would be the most valuable to you to permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is the type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that his guy is going to commit some criminal act of violence in the future."? What would you want to know about?

A What would I want to know?

Q Yes. I'm putting you on the spot, aren't I?

A That's really hard to say, as far as being specific, what I would like to know. I guess probably I would have to know some of the background of the person, maybe something **[1540]** that happened in the past or something like this.

Q Criminal background, had he done something like this before?

A Something like this in the past, you know.

Q That he's done some other violent acts in the past?

A Yes.

Q Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the

planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he calling the shots or just standing by? Did he have—like you said earlier, did he have to do what he did? Was it necessary that he kill this individual? Do you see what I'm getting at?

[1541] A Yes.

Q Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did, was he feeling bad about it, crying, unhappy about it, or was he nonchalant, was he blaze [sic], another day at the office, he just didn't care. If you learn all about the offense itself, do you think you could learn enough about a person if you learn all about what he did before, during and after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A Sure, there's a possibility.

Q The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was an unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted **[1542]** reasonably or unreasonably in killing him. Do you see what I'm getting at?

A Yes.

Q Let's shift gears for just a second, Mr. Warren, and talk about what we started talking about initially and that's the offense of murder. Let me make sure you understand what murder is and what a murder is not, okay?

A Yes.

Q Because you mentioned something earlier about self-defense. Let me talk to you about the offense of murder.

Let me set the ground work. You could be on a capital murder jury. Just imagine for it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have to prove both the murder and **[1543]** the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not guilty of capital murder and found him guilty of murder, which is what we did prove. Am I making myself clear?

A Are you saying, if you proved the murder and not the burglary, it's not capital murder?

Q That's exactly what I'm saying. In order for that to happen—let's say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic life sentence just for murder. Do you understand that?

A Yes.

Q Okay. I gather you feel pretty strongly about murder, do you not? I mean, goes without saying?

A Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, **[1544]** you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should.

Q All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice; is that correct?

A Yes.

Q Okay. Now, when we talk about murder, we talk about a situation where one person knowingly and/or intentionally causes the death of another human being without any legal excuse or any legal justification. Let's talk about what a legal excuse or legal justification is. One of them was mentioned earlier. It's self-defense. You, me, Mr. Nelson and everyone here has the right to kill somebody, if it's necessary, in self-defense. If we do that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you a **[1545]** low punishment, but if I understood and believed that you acted in self-defense, I would have to find you not guilty. You would have to find me not guilty, if things were switched around. Do you see what I'm getting at?

A Yes.

Q So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self-defense, then you have to find them not guilty. They're not guilty of murder, so don't be thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or **[1546]** something like that." It's not guilty because that's not murder. If you believe that I was insane, even though you might not like the insanity defense because a lot of people don't, if you honestly believe that I was insane when I killed somebody, it's not murder. Do you see what I'm getting at?

A Yes.

Q The same thing holds true, let's say, for a crime of passion, something that we all can understand. For example,

you're a parent and let say, God forbid, something should happen to one of our daughters. She's sexually molested, for example. You come home and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A Yes.

[1547] Q It's not murder. I want you to divorce your thinking from accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have been doing something because murder is a knowing and intentional act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A Yes.

Q Now, the reason I mention that is this: The law—as I said, there is a completely different range of penalties for the offense of murder. I don't want to be thinking about these other things where you might say that you would give a guy a break if it happened—if I though he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to do it." "I killed somebody." There is no legal excuse or no legal justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty **[1548]** for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A Are you speaking without any provocation or anything, just—

Q Right.

MR. CUNNINGHAM: Your Honor, we would object to without any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be?

A Well, if I have to just give you a flat answer without knowing the case itself—

Q Well I cannot give you a fact **[1549]** situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Let me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way to ninety-nine years or life and up to a $10,000.00 fine. The law simple says, to be a qualified juror, if you can in all honesty, you have to set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannot, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and intends to kill the individual and kills him—what do you feel would ever be proper, under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for knowing and intentional killing?

MR. CUNNINGHAM: If he **[1550]** thought that was the proper punishment.

MR. MACALUSO: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q In other words, could you ever vote for five years?

A I would try to make my decision based on the case and the evidence at the time.

Q Are you saying that you could?

A I could, based on the evidence that was given at the time, yeah.

Q All right. By the same token, I gather then, if you heard facts and circumstances that called for a sentence of ninety-nine years or life, if you felt that was the proper thing to do after you heard the **[1551]** evidence, you could do that?

A Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.

Q Let me ask you this, sir, in closing here: If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?

A Well, your mean just a flat yes or no on the death penalty?

Q Yes.

A Well, I probably wouldn't vote yes or no because there are cases where I do believe it probably would be proper, but there are other cases where I don't, so—

Q What I'm saying is, if you could tailor certain fact situations, do you feel that we should have the death penalty for certain types of cases?

A In certain types of cases, I do.

Q Mr. Warren, I've done most of the talking here and given you time to respond, but let me ask you: Do you have any questions of us, at all?

[1552] A Not at this time.

Q Do you know of any reason, sir, whether I've touched on it or not, why you couldn't be a fair and impartial juror to both sides?

A None whatsoever.

Q Is there any reason why you couldn't answer all three of those questions yes, if we proved that they should be answered yes, knowing that it would result in this man's execution?

A No.

Q I appreciate your honesty, Mr. Warren, with us. Mr. Cunningham and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—juror, rather.

THE COURT: Thank you. Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller-El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possibly some questions that may have been propounded to you by Mr. Macaluso. This first question may sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your race?

A Black.

Q I notice that you live at 4123 Telstar?

A Yes.

Q How long have you live there, sir?

A I've been there about eleven years now.

Q Are you buying your home or renting your home?

[1554] A Buying.

Q You work at Kroger's as a market manager?

A Yes.

Q How long have you been with the Kroger stores?

A About twenty-one years.

Q How long have you been market manager?

A About nineteen and a half.

Q Does your wife work outside of the home?

A Yes, she does.

Q In what capacity?

A She's an operator. She operates a bagging machine.

Q How long has she been employed?

A About twenty years.

Q You're a member of Salem Baptist Church?

A Yes.

Q How long have you been a member of Salem Baptist Church?

A About twenty years.

Q Your two sons, are they in high **[1555]** school?

A One of them is, the youngest.

Q Where is the oldest?

A My oldest, he's at home, but he goes to a college here in town and works at night.

Q Which one?

A Mountainview.

Q What year is he in at Mountainview?

A He's in his second semester.

Q How long were you in the army?

A About three months.

Q You're a member of Local 540 Union, meatcutters' union?

A Yes, I am.

Q Have you held any offices in that union?

A No.

Q Is your brother still on the police force in New Jersey?

A No, he's not.

Q How long was he on the police force in New Jersey?

A I'm not sure. He was up there, **[1556]** after he got out of the service, for about twelve years. I don't know exactly how long he was on the force.

Q This mishap that you son was involved in, was that Bengy or Joe, Jr.?

A That was Joe, Jr.

Q Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?

A No.

Q That was something at school?

A Yes, it was.

Q You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsoever on any issues in this case?

A Yes, I do.

Q And you could put that out of your mind?

A Yes, I could.

Q Was your brother-in-law a victim of a crime in Las Vegas?

A My brother. Yes.

Q Okay. What type of crime was it?

[1557] A I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.

Q How long ago was that, sir?

A That was about a year and a half or two ago.

Q How long have you been a member of Crime Stoppers?

A Well, the reason is, we have it in the neighborhood, you know, where we have—is it called Crime Stoppers or

Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, cut it's the neighborhood service thing where the neighbors watch each others [sic] homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of it, though. It was similar to that. They would have little meetings in the schools and PTAs and stuff like that. It was kind of a neighborhood thing is **[1558]** what it was.

Q What part of the city if Telstar located in?

A It's in Oak cliff off of Westmoreland.

Q Do you know of any reason, Mr. Warren, why you could not be a fair and impartial juror if chosen in this case?

A None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the hall for just a moment, please.

(Whereupon, Mr. Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSO: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we will exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon, Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you from service in this case, which means you will be free to leave here and go about your business. I want to add to what I said earlier and thank you for your patience primarily with

us and the system. You were down here Monday practically all day and you're down here late this afternoon. I note from some of these lawyers questions that they felt a great deal of respect for **[1560]** you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duty as a citizen. I wish you could serve as a juror on some cases, but evidently this is not the case. So you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you, Mr. Warren.

MR. CUNNIGHAM: Thank you.

THE COURT: That takes care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and Thirty-two.

(Whereupon, these proceeding are continued in Volume IV.)

* * * *

NOAD O. VICKERY

[1564] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, sir. I would like to start out by reintroducing everybody since it's been a couple of days. My name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. A third gentleman will be involved in this trial when we start the evidence: His name is Norman Kinne. Mr. Kinne is about fifty years old and is home with the chicken pox this week and will probably be there for a little while, I would imagine. I didn't like it much when I was seven years old and had them and I don't think I would like it now any more.

The three of us are assistant district attorneys here in Dallas and we've been assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Seated immediately to my left is **[1565]** Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Vickery?

Q Next to him is Mr. Royce West.

MR. WEST: Mr. Vickery, good morning, sir.

Q These two gentlemen have been appointed by Judge McDowell to handle the defense for the man at the far end of the table in the light blue suit, Mr. Thomas Joe Miller-El. Mr. Miller-El, as you've been told, is charged with the offense of capital murder, the most serious offense you can be charged with in the State of Texas.

I wanted to reintroduce everybody for two purposes; number-one, to reacquaint you and, number two, to ask you if you know any of us, either personally or by reputation?

A No, I do not.

Q Okay. Mr. Vickery, we have you in here by yourself today. I see that you have served on a criminal jury before back in '76 or '74; is that right?

A I think it was '76.

Q I would guess when you served on **[1566]** that jury you were talked to as a group sitting out in the gallery rather than individually. That's the way it is usually done.

A That's correct.

Q In front of forty or fifty people. Because this is such a serious case, we bring jurors in individually and it is hoped by doing that, because there are such strong feelings and opinions both ways on these subjects, people will be a little more open and a little more comfortable talking than they would be in front of forty or fifty other people. As best you can, we're going to ask you to relax. There aren't going to be any right or wrong answers to anything I ask you or anything I talk about. We're just trying to find out how you feel.

As you talk to me, Mr. Cunningham, Mr. West and the Judge will be listening also so that we won't have to go over the same things twice. Nobody is going to argue with you about anything you have to say and nobody is going to try to change your mind. Because of the seriousness of the offense and what we're dealing with here, we feel it necessary **[1567]** to go into some detail. I hope you will bear with me on that. Then I'm going to have to ask you some rather pointed questions from time to time. It's not because I'm nosy or I'm naturally curious. It will be some things that we need to know so that we can get the twelve people best suited to serve on this jury sitting in those chairs over there.

With that somewhat lengthy introduction, if you will bear with me, that's where we're headed in the next few minutes. I feel like it is only fair, Mr. Vickery, to tell you our position going into this case. We, Mr. Macalūso; Mr. Kinne and myself, represent the people of Dallas County and are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the persons on this jury sufficient type and quantity of evidence to convince them, number one, to convict Mr. Miller-El of capital murder and then in the second phase of the trial to convince you to answer those three questions yes. If those three questions are answered yes, the result is the death penalty. We'll talk more about that in a few minutes, **[1568]** but I feel like it is only fair for you to know going in what our position is. That's where we are and we're going to continue to seek the death penalty through out the trial with the expectation that we will be able to present to you that evidence and that man sitting right down there will be executed at some point as a result.

You had a chance on Monday, without having much time to give it thought, fill out a questionnaire. One of the questions on that questionnaire was related to the death penalty. I know this was kind of sprung on you. Most people come down here expecting to be on a civil case or shoplifting or something and you walk in here and get a capital murder, it's a little bit different.

Now that you have had a couple of nights to sleep on it and a couple of days to think about it, would you tell us in your own words your feelings on the death penalty, whether you feel it is proper or not, whether you feel like you could sit as a juror in this type of case?

A Well, sir, I've thought about it **[1569]** and I think, as a juror, that I wouldn't be deciding whether a Defendant got the death penalty or not. I would be deciding whether he was guilty or not. I think the law says that.

Q You're going to, basically, Mr. Vickery, be deciding both things. Let me just go over the procedure of the trial. Trials in Texas, as you've been through before, are two-state [sic] trials?

A Yes, sir.

Q. The first stage is going to be the guilt or innocence stage of the trial. That is when we have to prove to you the allegations in the indictment. We have to prove to you the offense of capital murder. If he is found guilty of the offense of capital murder as we've alleged, murder in the course of committing a robbery, then the issue becomes, very simply, does he get a life sentence or does he get a death sentence. Once a person is convicted of capital murder, those are the only two possible punishments, life or death.

Now up to about thirteen years ago, the legislature had made the law in such a way that the jury decided that directly. They **[1570]** would listen to the evidence and go out and put on the jury form either life or death and sign it. That was changed about thirteen years ago to a procedure where the jury answers questions rather than saying life or death. The questions are those three right there. If you want to just take a minute to go over those.

A (Juror complies.)

Q We'll talk about those in some more detail in a few minutes, but basically what the law says, Mr. Vickery, is a yes answer from the jury to each of those three questions results in the death penalty. Judge McDowell has absolutely no option at that point. He cannot say, no, I don't agree and

make it a life sentence. He cannot say, no, there is something wrong and ask for a retrial or anything else. If you answer those three questions yes as a jury, Thomas Joe Miller-El will receive the death sentence and we anticipate at some point he will be executed as a result of that death sentence.

If one of those questions is answered no, then Judge McDowell must, under the law, assess a life sentence. Again, he has **[1571]** no option. Even though the jury is actually writing life or death any more, the result is the same. Am I making myself clear about that?

A Yes, sir.

Q Okay. I was a little concerned when you said you didn't feel like the jury would be setting the sentence because, in essence, you are setting the sentence by answering those questions. Knowing that and with that explanation, I would like you to expand a little bit more, if you would, on what you were saying about your feelings on the death penalty?

A Well, I feel, as a juror, I would be sitting there having to listen to the evidence and decide—make my mind up—what I think is guilt or innocence. The laws, as you explain it to me, are written and I agree that I would have to say yes to either three questions or whatever you said, but still feel like that I don't write the law and I don't say where the Defendant gets the death penalty or not in one sense. I mean, the law says—whatever my decision is, then the law says what happens, not I.

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things that we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

[1573] A That's correct.

Q You don't have to deal with it every day, but I want to emphasize and I think you realize this, it's not what somebody else is dealing with any more. Now, it's something that you're going to have to deal with if you serve on this jury. I think it is only fair that you know and understand that the effect of what you do—if the answers to those questions are yes, the effect of what you do is going to be the death of this man sitting down here at the end of the counsel table. At some point he is going to be taken from his cell in Huntsville and walked down to the death house and have an IV inserted into his arm and be injected with a lethal substance until he is dead as a result of the verdict that was rendered in this case if those three questions are answered yes.

This is something that I feel like we need to deal with and you're going to have to deal with it at some point. I know you haven't given it much thought and I don't mean to argue with you or pressure you or anything else, but you just really don't have a gut **[1574]** reaction one way or the other as far as the death penalty goes; is that what you're saying?

A Well, I guess the death penalty probably serves a purpose. You know, it's like an animal sometimes that you can't control. I don't know any other way to control them. Perhaps that is the only solution.

Q The reason I'm asking you all of this, Mr. Vickery, is, the law requires you to come down here and make yourself available for jury service.

A Yes, sir.

Q If you're suited to serve on a jury, it requires you to serve and follow the law. The law doesn't require you to do something that would be against your conscience or have such a lasting effect on you that it would influence you the rest of your life or bother you very deeply, your deep values or moral commitments, however you want to put it. Because of that the law does not require you to serve on a case like this that would violate your deep conscientious feelings or moral feelings or something like that. We want twelve people over here who—I think it's **[1575]** fair to say that nobody particularly wants to make this type of decision as a juror because it's very difficult to make this kind of decision. By the same token, we want twelve people over there who feel like they are able, without violating any deep feelings, to make this type of decision knowing that their decision may result in the death of another human being. That's the reason I keep going back to this. It's kind of like applying for a job, I guess.

If I were applying for a job, I want to know what I'm going to have to do and give some thought to whether I can do that or not before I apply for the job, before I make the decision to sign that application saying I want the job. By the same token, we want you to know going in what is going to be required of you if you take an oath to serve as a juror in this particular case.

I guess another thing to look at is—you have one son; is that right, Mr. Vickery?

A That's correct, yes.

Q He's grown now and out of the **[1576]** home, I see, but I bet you remember when he was growing up—at least the children I've been around. My little girl is four and she hasn't done this much yet, but children will come up to you and say, "Daddy, I want you to promise me something. I want you to promise you won't be mad if I tell you something." "Well, tell me what it is." "I'm not going to tell you. I just want you to promise you won't be mad before I tell you anything about it." You want to know what you're promising

before you promise to do it. That's the kind of situation we're in here. I want you to know what you're promising to do and what you're dealing with before you have to do it.

I guess what it comes down to—the bottom line is, Mr. Vickery, with that long-winded explanation, knowing that your actions could result through the system in the death of Thomas Joe Miller-El, do you feel like you could serve on a jury like this?

A Yes. I think I can make a decision. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I **[1577]** don't particularly want to make it, but I think I could.

Q Okay. You've said, Mr. Vickery, that you don't really know how you feel about the death penalty. Have you ever been opposed to it at any point? I mean, some people when they're younger and in college or whatever are opposed to it and as they get older, they become in favor of it or vice versa. Have you held strong feelings one way or the other ever?

A No, I haven't.

Q Okay. So this is just something that you haven't spent a great deal of time being concerned with because you haven't had to deal with it?

A That's correct. You know, you read about it and you hear about it, but you're put in a spot where you've got to make the decision and it's a different story. I would be like anyone else. I can sit in front of a TV and say, "They ought to hang the guy." That's just in your thoughts at that time and you're not there making that decision. You're not pulling the rope.

Q Right. And that's why we're **[1578]** telling you exactly what you're dealing with here so you know what your part is going to be in this trial and what effect your decisions are going to have in this trial. You're telling me now that, once I've given you that explanation, you feel like you could handle that duty and make that decision?

A Not because I want to, but if, I was asked to, I think I could.

Q I think I'm probably pretty fair in saying, Mr. Vickery, that nobody comes down here and wants to render a verdict that results in someone else's death. That's not going to be an easy decision for anybody because you're taking another human life and, if you have any feelings for life at all, you have a problem doing something like that. I think anybody would agree with that.

Capital murder in Texas is applicable to only certain types of offenses. The death penalty is not applicable to a regular murder case. It has to be capital murder and that means either, number one, killing a certain class of persons like police officer or a fireman or a jail guard **[1579]** and, number two, a mass murder. Third, the type of case we're dealing with here, what we call murder plus.

What we've alleged in this case, Mr. Vickery, is that this Defendant did knowingly or intentionally cause the death of another individual without any legal justification. That's murder at that point. But then we go further and we say he caused that death while in the course of committing or attempting to commit the offense of robbery. That's why we say murder plus. It's murder plus another offense happening during the same transaction basically. He not only killed someone, but be did it in the course of committing robbery.

Do you have any problem with the death penalty being an option in a case like that?

A I don't think so.

Q Okay. I've told you basically how the procedure—and you've been through it once, so you know more or less how things are going to go. In the first part of the trial we have to prove to you what is in the indictment. **[1580]** We have to prove to you that he knowingly or intentionally caused the death of another individual and they did it while in the course of committing or attempting to commit robbery. I emphasize the fact that we have to prove that. The burden of proof is here. Right now, as Thomas Joe Miller-El

sits down at the end of that counsel table, he's presumed to be innocent. If you were called upon to go out and deliberate at this point, you would have to find him not guilty, not because he didn't do it, but because we haven't proved it yet. The burden of proof is right here on this table with Mr. Kinne, Mr. Macaluso and myself. It never shifts to that table. They never have to present anything throughout this trial if they don't want to. He's presumed to be innocent and we have to prove the case beyond a reasonable doubt.

You were probably told in your other trial that there is no definition of beyond a reasonable doubt in the law. We're going to ask you to put a common sense meaning on those words and determine whether he is guilty or not beyond a reasonable doubt. Do **[1581]** you have any problem with that?

A No, I don't.

Q You feel like you could hold us to our burden of proof then?

A Yes, I do.

Q And you would make us prove our case?

A Yes.

Q Now, you, if I recall, own your own business; is that correct?

A That's correct.

Q Do you have persons working for you?

A Yes, I do.

Q Could I ask how many?

A Five.

Q So you're making decisions every day with reference to your business and your employees; is that right?

A That's correct.

Q Analyzing facts and circumstances and making a decision as to what ought to be done in response to those?

A Yes.

Q And you don't have any problem **[1582]** making decisions?

A Not any more than any one [sic] else.

Q Okay. Once that decision has been made, if he is found guilty of murder, then these questions don't come into play. Then the range of punishment is anywhere from five years up to ninety-nine years or life in the penitentiary. The death sentence is not an option if he is just found guilty of murder. We'll talk about that a little bit more.

If he is found guilty of capital murder, again there are only two options, either a life sentence in the penitentiary—and that's a sentence that is subject to the same rules and regulations and considerations as any other life sentence in the State of Texas—or a sentence of death. That's where the questions come in.

You've read them. Let's go over them in just a little bit more detail individually. Question number one: "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" Mr. **[1583]** Vickery, what does that—what do you feel like that is asking you?

A Basically did he do it just deliberately; in other words, with the intent.

Q Okay. For example, if I took a gun and put it to Mr. Macaluso's head and pulled the trigger, it would be pretty clear that I intended to kill him when I did that?

A Yes, sir.

Q But if I take a gun and shoot at his foot and in some wild way the bullet bounced off the floor and off the wall and came back and killed him, there might be a real question in your mind whether I actually expected that his death would result from doing something like that?

A That's correct.

Q Was I deliberately trying to kill him—okay. That's pretty straight forward. Let's look at question number two.

That's a little bit more involved. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do your feel like they're asking for there?

[1584] A Well, I think just basically, if he was released and on the streets, is he a violent person and would he commit the same crime again and kill again.

Q Okay. Would you agree with me that criminal acts of violence doesn't necessarily mean that he would have to kill someone else again? There are other things that are violent like rape, for example—

A Yes, sir.

Q —or robbery or assault or something like that? Even if I took a baseball bat and hit Mr. Macaluso up side of the head three or four times, would you agree with me that that is an act of violence?

A Yes, sir.

Q I think probably a key word in that, Mr. Vickery, is probability. You're in a pretty exact business as a draftsman and you deal with pretty exact angles and figures and that kind of thing. What does probability mean to you?

A Probability would be that it is a possibility, that it possibly will happen again. In other words, there's a good **[1585]** chance—probability would be that there is a good chance it would happen.

Q Okay. A possibility or a good chance it would happen again. Now, it could be, Mr. Vickery, that the only evidence you would receive in this case is the evidence as to the offense, what happened before the offense, during the offense and after the offense. That might be all the evidence that you would receive in this case. We have the burden of proof on these questions on the second phase also as we do throughout the trial, but you may be asked to base your verdict on just the facts of the case, the facts of this particular offense itself. Can you see how that might be sufficient to make a decision on question number two?

For example, if you looked at what happened before the offense; was it something that was planned or was it a spur of the moment kind of thing; was it something where the Defendant was involved in the planning or was he not; the time during the offense, what role did the Defendant play; was he a leader, was he in there giving orders or was he kind of a **[1586]** follower; was he maybe just a lookout; could he have done something less than what he did; could he have stopped short of doing what he did and cause less damage or less violence? Third, what about conduct after the offense; was he remorseful; did he feel bad about what had happened or was it just another day at the office? Well, somebody is dead. It was kind of like killing a fly. How did he act afterwards? Would you agree with me that those kinds of things could help you in answering question number two?

A Yes, sir.

Q Is there something else that you—some additional type of evidence you would look for or be interested in in answering question number two?

A I think you've covered it all.

Q Okay. Is there one of those that would be more important than the others, one thing that would really stick out in your mind in making that kind of decision, one thing you would really look for?

A Perhaps his—not really. They all blend together, really. It just depends on **[1587]** whether a person intentionally did something, planned for it, whether he had a remorse for doing it. I would consider those.

Q Okay. That's basically question number two. Now question number three is over here on a separate board. "Was the conduct of the Defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" That's kind of a convoluted way of putting the question. It's kind of legal ease. That's the way lawyers talk all the time. It's convoluted. Would you agree with me that that is basically asking was the killing provoked or was it an unprovoked killing?

A Yes, sir.

Q If it was unprovoked, you would answer that question yes?

A That's correct.

Q If there was some provocation, then you would have to make a decision whether, like the question says, his actions were reasonable in response to that provocation?

A Yes, sir.

Q You may get that question or you **[1588]** may not. It depends on the evidence. If it is raised by the evidence, you will get that question. If it isn't, you will just get questions one and two and those will determine what happened in this case. Again, a yes answer to both of them results in the death penalty. A no answer to either one results in a life sentence.

I want to emphasize again, Mr. Vickery, that we have the burden of proof throughout the trial, on the guilt of the Defendant and on proving those questions. We always have the burden of proof. You've got to base your verdict on the evidence. Can you listen to the evidence and can you see how those questions could be answered either yes or no depending on what the evidence shows?

A Yes, I do.

Q Okay. You will listen to the evidence and keep an open mind until you've heard all of the evidence before you make a decision both on the guilt phase and on answering those questions; is that right?

A I think so, yes.

Q Okay. That's all we ask, that you **[1589]** keep an open mind and remember that they don't have to present anything if they don't want to. The Defendant has an absolute right not to testify. If he chooses not to testify, you can't even consider that. You can't even talk about it in your jury deliberations. You know that from being on a criminal case before?

A Yes,

Q Now, Mr. Vickery, I guess probably part of the reason that the legislature puts these questions in is kind of a buffer between just an emotional gut reaction type of verdict that this guy deserves death and more of a reason type of verdict from looking at the facts of these types of questions. Are you telling us that, even if you had a gut reaction that, no, this guy doesn't deserve the death penalty, if we had proved the answers to these questions should be yes, could you answer them yes in spite of your personal gut reaction type of feelings?

A Yes.

Q Vice versa, if you believed that he deserved the death penalty, just because you're made [sic] about it or upset about what had **[1590]** happened and the facts of the case, if we failed to prove one of those beyond a reasonable doubt, could you answer it no even knowing that it would result in a life sentence and not the death penalty?

A Yes.

Q So you would base your verdict on the evidence?

A That's correct.

Q That's all we ask you to do. Now, there was one thing that we don't anticipate will happen in this case, but it might so we need to cover it with you. Do you remember that I told you earlier that capital murder in this case was murder plus another offense. If we fail to prove that second offense—if all we prove is that this Defendant knowingly or intentionally caused the death of another individual, but we don't prove it was in the course of committing robbery, then we haven't proved capital murder. We've just proved murder. I think you remember that I said few moments ago, the range of punishment for that is from five years up to ninety-nine years or life and a fine of up to $10,000.00. The death **[1591]** penalty is not an option in that case. Am I clear on that so far?

A Yes, sir.

Q If you are to be qualified to serve as a juror on this case, you have to be able to tell us that you can consider the

entire range of punishment for the offense of murder if he is found guilty of simple murder, the killing of another individual without any legal justification or excuse whatsoever, no self-defense, no accident, no killing in the heat of passion or anything like that, knowingly or intentionally killing another human being. Mr. Vickery, I'm just going to ask you, if, after hearing all the facts and circumstances, all of the evidence, you convicted a person of murder, if you feel that the facts and circumstances justified a sentence of ninety-nine years or life, could you give that sentence?

A Yes, I could.

Q The other end of it is this: If, after you convicted a person of knowingly and intentionally killing another human being without any legal justification or excuse—**[1592]** would you agree with me that there are a number of circumstances that could enter into a killing? It might not be legal justification, but a number of surrounding facts and circumstances?

A I agree.

Q They could all have an effect on something like that. If, after hearing all the facts and circumstances of the case, you convicted the person of murder, if you felt like, based on the evidence, in your own mind, those facts and circumstances justified a five year sentence for the offense of murder, could you consider that and give that?

A Yes, I could.

Q So you're telling us you could consider the entire range of punishment for the offense of murder, the knowingly and intentionally killing of another human being; is that right?

A I feel like I could, yes.

Q Obviously we can't tell you the facts of the case. We can't even give you any examples of what some facts might be. All you have to be able to tell us is, if you hear the **[1593]** case that justifies life, you will give life. If you hear the case that calls for five years in your mind, you will give five years and you will keep an open mind until you've heard all the

evidence. I think you're telling us that you can do that; is that right?

A I certainly feel that I can, yes.

Q Okay, Mr. Vickery, that's all that we ask. There is one other thing and that is, there may be certain circumstances in cases in Texas where there is only one eyewitness to a crime. For example, if you have a purse snatching or a rape, it could be the only two people there are the person that committed the crime and the victim of the crime, the person who was raped. The law allows the State of Texas to prove a case with only one eyewitness. If you believed that witness beyond a reasonable doubt as to every element of the offense, the law says that's enough and you're required to convict that person based on the testimony of one eyewitness. If you don't believe a person beyond a reasonable doubt as to anything in that indictment, you're required by the law to find him not guilty as in any **[1594]** other case. What I'm getting to is, do you feel like you could base a verdict, guilty or not guilty, as the case may be, on the testimony of only one eyewitness?

A You're not saying that would be the only proof?

Q It might be the only proof. Let me emphasize, if you believed that witness beyond a reasonable doubt as to everything in the indictment.

A If I personally believed it, I would do so, yes.

Q If you didn't believe him as to one element in the indictment or more than one, then you would find the person not guilty; is that right?

A That's right.

Q It's just like, if we presented eighty witnesses, if you weren't convinced beyond a reasonable doubt, you would find the person not guilty?

A That's right

Q Okay. So you're telling us then that you could base a verdict on just only one eyewitness; is that right?

[1595] A I feel like I could, yes.

Q Okay. Mr. Vickery, you've been very patient with me and very open about answering the questions and I appreciate it. Is there any questions you have or anything I've touched on that we need to talk about?

A I don't believe so.

Q Okay. Mr. Vickery, I want to thank you very much for your time and your patience with me. These lawyers will probably have some questions for you and I won't bother you any more. Thank you very much .

THE COURT: Thank you, Mr. Nelson. Mr. West, go ahead.

[1596] EXAMINATION

BY MR. WEST:

Q Mr. Vickery, as I was previously introduced, my name is Royce West and I have just a few questions. The purpose of these questions is basically to get to know you and test your qualifications to be a fair and impartial juror in this particular case, okay?

A Yes, sir.

Q If I talk too fast or if you don't understand my question, say, "Hold up, Mr. West. I don't understand. Slow down." Okay?

A Very good.

Q Let's just shoot off the cuff with one another. You seem to be a very straight forward person and that's the way I want you to deal with me in this situation, okay?

A Yes, sir.

Q Now, I notice from your data sheet that you're the president of Southwest Detailers Association?

A That is correct.

Q What type of organization is that, sir?

A It's an organization of owners of **[1597]** detailing firms which is a form of a drafting service.

Q How many members does it have?

A In Southwest Detailers Association, there's twenty-two members.

Q How long have you been president?

A One year.

Q You're currently the president?

A Yes, sir.

Q Are you the member of any other types of organizations?

A I also belong to the National Institute of Steel Detailing.

Q Any type of civic organizations?

A No, sir.

Q Have you ever been a member of any type of civic organization?

A I have been a member of the Chamber of Commerce is all.

Q Dallas?

A Yes.

Q Raymondsville is in the valley?

A Yes. Rio Grande Valley, yes, sir.

Q How long have you been in Dallas, sir?

[1598] A Since I was a child, about forty-seven or forty-eight years.

Q So Dallas is basically home?

A That's correct.

Q What school did you graduate from here in Dallas?

A Woodrow Wilson High School?

Q Out there by Tenison Park?

A Reasonably close, yes, sir.

Q Now, let me ask you some questions right now. You're the vice president of your own business; is that correct?

A That's correct.

Q Do you supervise two or more employees?

A Yes, I do.

Q How many employees, sir?

A Five.

Q Are any of those employees black?

A No, sir.

Q Have you ever had any blacks work for you?

A No, sir.

Q Have you ever had any apply for a job?

[1599] A No, sir.

Q Did you attend school with blacks?

A Not in high school.

Q In college?

A Yes.

Q Okay. Do you live in what you would consider an integrated community? You live in Garland, is that correct?

A That's correct.

Q Do you live in an integrated community?

A Yes, sir.

Q What percent would you say was black, brown and anglo?

A Oh, I don't know. I live in townhome addition. I would say there's probably four or five black families that live in the community.

Q Do you know any of them?

A I know them, but I don't know them well.

Q You just know them by sight?

A Well, I did know—Billy Joe Dupree was my neighbor at one time, but he moved. I knew him. He played with the Dallas **[1600]** Cowboys. He lived two doors down and I knew him, but he's the only one I knew personally other than just to meet someone at meetings and that type of thing.

Q Okay. Again, I'm not trying to pry into your life, but I need to know some things for our purposes in representing our client, okay?

A Yes, sir.

Q Based on your data sheet, it indicated that you're widowed?

A That is correct.

Q Now, when did this occur?

A Three years and three months ago.

Q Was it as the result of an accident?

A No, it was cancer.

Q Were you with your wife during her last sickness?

A Yes.

Q Now, also on your data sheet it indicates in response to question number forty-seven, "Have you, your spouse, member of your immediately family, or close friend or relative ever been a victim of a crime." You indicated **[1601]** your sister?

A That's correct.

Q "Info not know." What did you mean by that?

A It happened when she was—I was a teenager and she lived in Chicago and she was assaulted and put in the hospital. I know she came home—I was still living at home and she came home and stayed several months to recuperate. I don't know the details of that. I just know that she was assaulted.

Q That wouldn't affect your deliberations in this particular case, would it, or your ability to serve as a juror?

A I don't think so, no, sir.

Q You're saying no, it won't?

A No, it would not affect me.

Q Okay. You indicated also that your sister had been charged with, arrested, indicted and convicted of a criminal offense?

A That's correct.

Q What was that about and when was it?

A Again, I do not know the details. I know she was arrested and served time in the **[1602]** penitentiary. It was in California. Again, I was a teenager and I do not know the details.

Q Because you were a teenager at the time?

A Yes.

Q Would that affect your ability to serve as a juror in this case?

A I don't think so, no.

Q You keep on saying "I don't think so". When you say I don't think so, you're saying that's no?

A No, it would not. I'm sorry.

Q You served on a criminal jury here in Dallas in 1976?

A I think it was '76. I didn't write it down; but it was about ten years ago.

Q Do you recall what type of case it was?

A It was a theft case.

Q How many people were on the jury?

A Twelve.

Q Were you able to reach a decision?

A Yes, we were.

Q And the jury assessed the punishment?

[1603] A Yes.

Q Now, I want you to understand something concerning the burden of proof. Mr. Nelson kind of went over it, but I need to go back over it with you. You pretty well understand the nature of the criminal justice system, that a person is innocent until proven guilty?

A Yes, sir, I understand.

Q Do you agree with that premise?

A Yes, I do.

Q Do you agree that the State should have the burden of proving a citizen accused of an offense guilty beyond a reasonable doubt?

A Yes, I do.

Q Now, as Mr. Nelson indicated, you will not get a definition of what beyond a reasonable doubt is. You're going to have to basically put some common sense or put some meat on that particular bone?

A Yes.

Q Now, in making a determination as to whether or not the State has shouldered its burden of proof, you're going to have to judge the credibility of the evidence that you **[1604]** receive as a jury, okay?

A Yes.

Q Now, in judging the credibility of the evidence, you may—and I anticipate that you will—hear live testimony, someone sitting on the witness stand in the that very seat. You will be sitting over here with the jury. You're going to have to look at that person, make a determination as to whether or not that person is telling the truth or telling a lie. Let me ask you this: Have you ever had to tell whether a person is telling you the truth or telling you a lie?

A Yes, I have.

Q Okay. Now, have you ever had a situation where a so-called friend of yours does something and blames it on you? Have you ever had that happen to you?

A Probably. I don't recall for sure, but I'm sure I have.

Q Okay. Have you ever had an employee or your son or some relative of yours blame something on another relative and that relative says, "What are you talking about? I didn't do it." Have you ever had that **[1605]** situation happen to you?

A Yes, I have.

Q Have you had to make a determination as to who was telling the truth and who was telling the lie?

A Yes.

Q Okay. Some of the same factors that you used in order to make a decision, like that may very well have to be used to make a decision in this particular case.

A I understand.

Q Okay. When you get ready to make that determination, let me suggest that you use a scale from zero to ten. Ten, you believe the person is telling the truth and zero you believe that they're lying to you, okay? You can believe all of, some of and none of what a person says. Look at their demeanor. Now, one thing that I've always been told and pretty sure in your years, you've heard this also—when you ask a person a question and they start off, when they're getting ready to answer, with, well, and then ah, they're trying to buy time. wouldn't you agree with me?

A Yes, sir.

[1606] Q Then you need to take a look at that person's demeanor, you know, is he looking around, can he look you in the face and tell you the truth. Do you normally take that into consideration?

A Yes, I do.

Q I ask you to take into consideration those things when you're sitting over there and making your determination as to the credibility of the evidence that you receive. Will you do that, sir?

A Yes, I will.

Q Now, when you make that determination as to the credibility of the evidence, specifically the live testimony, and bring that to bear on the issue of reasonable doubt—well, if I believe the person one hundred percent, then I don't have a reasonable doubt as to what he or she is testifying to. When you get in physical evidence—and you may or may not get into physical evidence—judge the credibility of the weight the physical evidence was received, how it was preserved and what bearing it has on the fact in a particular case. Is there a conflict over **[1607]** the physical evidence as

to where it came from, how it came into a certain person's possession? Do you understand what I'm saying?

A Yes, sir.

Q Again, you'll probably have live testimony and you can use that testimony to make that determination, okay?

A I understand.

Q The burden of proof, it's over here at this table right here. They're two fine lawyers and they will be joined by a third lawyer, who I've worked with in the past. You will have three fine lawyers over here that know the ins and outs of the court.

A Yes, sir.

Q But keep the burden of proof on them. Make the State do its job.

A I understand, yes.

Q All right. If I were to ask you to render a verdict in this particular case right now, what would your verdict be?

A I couldn't make a decision.

Q How come?

A I haven't heard any evidence, I don't know any details.

[1608] Q So what would your verdict be?

A It would have to be not guilty.

Q All right. As my client sits here today, sits there right now, he is presumed to be innocent. The State has the burden of proof. He is presumed to be innocent as he is sitting there today. Make them prove their case, if they have a case, if they can, and if they can, in fact, prove their case. They brought the charges. They're going to have to prove it. Okay?

A Yes, sir.

Q All right. In your business—you probably make a lot of decisions in your business; is that correct?

A Yes, sir.

Q What was the last major decision that you had to make concerning your business?

A The last major decision was probably moving our offices.

Q I'm sorry?

A Moving our offices, relocating.

Q Had you developed a great deal of good will—did you move your offices?

A Yeah. Our lease ran out and we **[1609]** had to decide whether to re-lease or negotiate for a new lease someplace else.

Q You had developed a great deal of good will at your prior establishment?

A I beg your pardon?

Q You had developed a lot of good will?

A It wasn't good will, but you said a major decision. That's a business decision, you know, whether to move your offices or not. Of course, I make decisions every day as to whether to bid jobs, you know, take contracts for a certain amount of dollars, whether my company can make money at it or not.

Q So you're used to making decisions?

A Surely.

Q Would you say that you are an individual thinker?

A I think so, yes, I do.

Q Are yon easily swayed?

A I don't think so, no.

Q "I don't think so, no."

A Well, who knows if you're easily swayed? You're trying to sway me now, but I'm **[1610]** not—I think for myself is what I'm saying. I listen to other people and sometimes say, "Hey, that's a good idea. You've got a good point.", like anyone should, but I don't think anyone can sway me to do something against my will.

Q All right. In other words, even though you're sitting as a juror and collectively as a jury in this particular case, you will be an individual thinker and your decision will be based on what you perceive the evidence to be; is that correct?

A Most definitely.

Q And you will cooperate with other members of the jury in discussing the facts of the case, but if you believe strongly in a particular point, you're going to stick with that; is that correct?

A Unless they can prove to me differently.

Q Okay. So you're not easily swayed? I don't think so, no.

A I believe that I'm not easily swayed. You may believe it, but I don't.

Q Well, I don't know you well **[1611]** enough, yet. Okay. Now, can you take an oath that the mandatory penalty of death or imprisonment for life will not affect your deliberation on an issue of fact?

A Would you repeat that, please?

Q Can you take an oath that the mandatory penalty of death or life imprisonment would not affect your deliberation on an issue of fact?

A Yes.

Q You can?

A Yes.

Q Now, you had indicated on your data sheet that you weren't sure what you believed as far as the death penalty is concerned?

A Yes, I put that on there.

Q And subsequent to that, Mr. Nelson talked with you about it and you indicated, if called upon to take the job, as Mr. Nelson indicated you could, in fact, perform the job duties and responsibilities basically?

A Yes.

Q All right. Now, understanding—and since he used the analogy of a job, I'll **[1612]** try to stay with that. Understanding that there are some tasks that your job may very well call for that may very well be unpleasant, you still would be able to do that because you signed up for the job, so to speak, correct?

A That's correct.

Q Now, understanding that and understanding that the State has the burden of proof—and I'm focusing your attention to questions one and two and three, okay?

A Yes, sir.

Q As Mr. Nelson indicated, if the jury answers these questions in the affirmative, answers one, two and three in the affirmative, then the Judge will have no other choice buy [sic] to sentence my client to death by lethal injection. The State still has the burden of proof. I don't know whether that was clear or not. They must prove beyond a reasonable doubt that the allegations in special issue number one before you're required to answer that question yes. Do you understand that?

A Yes, sir.

Q It's two phases, guilt or **[1613]** innocence and then the penalty stage, if we get to that stage, first of all. If we get to that stage, the burden of proof is still beyond a reasonable doubt.

A I understand.

Q Okay. Now, focusing in on special issue number two here, Mr. Nelson asked you whether you believed that the facts and circumstances surrounding the actual incident itself would be sufficient for you to make a determination as to whether or not a person would commit criminal acts of violence that would constitute a continuing threat to society and I believe your response was yes?

A Yes, sir.

Q Would additional evidence such as the ability to change a rehabilitative program geared towards changing

violent attitudes of individuals also assist you in making a determination as to whether or not the probability exists, if you had evidence concerning certain types of rehabilitative programs that are available for individuals with violent attitudes?

A Would that have any affect on my **[1614]** decision about a particular person?

Q Right. Would it have any affect on—yes, sir—your decision about a particular person?

A I'm confused about the question, sir. I don't understand exactly what you're asking me.

Q Question number two deals with the probability of a person convicted of capital murder committing basically future criminal acts that would constitute a continuing threat to society.

A I understand that.

Q Okay. You're going to have to have evidence concerning that particular point to make a determination as to how to answer that question, agreed?

A I assume that you're saying that some evidence be presented saying that he would or would not be a menace to society or he might do it again; is that what you're saying?

Q Yes, sir. There are programs available to modify a person's behavior.

Q Are you saying could I accept the fact that possibly these programs could help **[1615]** this particular person?

Q Yes, sir.

Q [sic] I think I could consider it, yes.

Q Okay. I'm not asking you to commit to it. I'm asking you would you consider it?

A Would I consider it?

Q Yes, sir, in making your determination as to how that question should be answered?

A I think I could consider anything that was presented to me, yes.

Q Would you consider the success of those programs?

A That's a hard question to answer. I don't know what the success would be.

Q I'm saying would you consider it? I'm not asking you to commit or say, if we showed you that or the State showed you that, that you would buy it hook, line and sinker. I'm asking you will you keep an open mind and consider it in answering that question?

A Certainly, I would consider it, yes.

Q Now, as Mr. Nelson indicated **[1616]** sometimes you have a situation in a capital murder, as in this particular case, where a person is charged with what we call a murder plus, murder plus some other felony. In this particular case, murder plus a robbery. That's what makes this a capital murder case, okay?

A Yes, sir.

Q In some cases there may not be evidence sufficient in your mind to say that the individual did, in fact, commit the robbery, but you believe that the person committed the murder, okay?

A Yes, sir.

Q Now, where you have a murder, the law as promulgated by our legislature has set out some justifications for committing the offense such as, "Yes, I killed Mr. Cunningham, but I did it in self-defense." "Yes, I killed Mr. Cunningham, but I was insane at the time that I did it." Insanity, self-defense, accident, mistake, those are justifications and if believed by a jury are sufficient within itself for a verdict of not guilty. Do you understand what I'm saying?

A Yes; sir.

[1617] Q Okay. Murder, knowingly or intentionally taking the life of someone else without any legal justification, i.e., self-defense, legal excuse, i.e., insanity. Are you still with me?

A Yes, sir.

Q The range of punishment for murder is from five years to ninety-nine years or life and an optional fine of $10,000.00. That's the range of punishment in the State of Texas, okay?

A Yes, sir.

Q If you found a person guilty of knowingly and intentionally taking the life of someone else without any legal justification or legal excuse, would you sir, under the appropriate facts and circumstances in your mind, assess a penalty of five years confinement in the Texas Department of Corrections? Let me say that again. Legal justification, legal excuse, self-defense, insanity. If a person—if you were sitting on a murder case and you found that a person knowingly and intentionally took the life of someone else without any legal justification, **[1618]** any legal excuse, under the appropriate facts and circumstances in your mind, could you assess the minimum of five years confinement?

A No, I could not.

Q Why couldn't you do that, sir?

A I just don't think it would be a severe enough punishment for someone that intentionally committed murder with no reason or excuse.

Q Now, let's explore that a little bit. Again, no excuse for doing it.

MR. NELSON: Excuse me, Judge. We're going to object to that as being improper. There may be an excuse. There may be a reason that could enter into it, but—

MR. WEST: I think counsel can make a legal objection and not make a statement. If he's going to make it, I would ask that the juror be excused at this point.

THE COURT: Go ahead and make an objection.

MR. NELSON: That the **[1619]** phrasing is no legal justification or excuse, not any justification or excuse. There's a difference.

THE COURT: Go ahead and ask your question, Mr. West.

Q Again, did you understand me to say legal justification or excuse?

A I understood you to say if it was proven that a Defendant had no excuse, they killed someone and there was no excuse for doing it, would I give him only five years; is that what you're asking me?

Q If I said just excuse—legal justification or legal excuse. Now, let's explore legal justification and legal excuse so that you can understand what I'm saying, okay?

A All right, sir.

Q When I said legal justification, self-defense. You know what self-defense is, right?

A Yes, sir.

Q Okay. That's a legal justification. A legal excuse would be insanity.

A If you say so.

[1620] Q That's not what I say. That's what the law says.

A Well, I don't know the law, so I mean, if the law says so, okay.

Q I'm purporting to you that that is what the law says and, if that's not what the law says, I'm sure Mr. Nelson will jump up and object to it and make sure that you understand what the law is. So knowing that that is the law, I'm asking you again—I believe your response was that you couldn't originally—if you found a person knowingly and intentionally took the life of someone else without any legal justification, without any legal excuse, could you, under the appropriate facts and circumstances in your mind, assess a penalty of the minimum of five years confinement in the Texas Department of Corrections?

A No.

Q Never?

A Well, you're asking me to make a decision right now on what you told me—

Q No. No.

A —and I just said no. I'm not talking about any particular case, but you said **[1621]** could I and I said, no, I don't think I could give five years. You said there would be no legal excuse; is that correct? Am I understanding you correctly?

Q Yes. Now, I'm not asking you at this point in time—I can't give you an example. There are probably fifty million examples, but I can't—the law will not, permit me to give you examples right now. I'm not asking you to commit to any particular type of an example. I'm saying, if you found a person guilty of murder as I've explained it to you, can you conceive of any facts or circumstances in your mind, can you—strike that.

Now, it is my understanding if you find a person guilty of murder beyond a reasonable doubt, under no circumstances could you assess the minimum of five years confinement in the Texas Department of Corrections, is that correct? I'm not arguing with you. There is no right or wrong answer, Mr. Vickery.

A I think from what you just stated, five years would not be sufficient.

[1622] Q And you would never assess a minimum of five years?

A Never is a long time, so I'm not going to say never.

Q You would not consider the five years in making a determination, understanding what the range of punishment is, being from five years—

A No. I do not think I would consider five years.

Q There we go again.

A No, I would not consider, sir, if that's what you want to hear.

Q Well, that's not what I want to hear.

A All right. I'm sorry that my phrasing of things don't suit you, but I'm just saying, if it was proven without doubt or without any reasonable doubt and no excuse, no, I don't

think—I do not—I would not give five years, no. I think it would not be enough.

Q And you wouldn't change your mind about that?

A Well, no, I wouldn't change my **[1623]** mind.

Q And there is nothing that I can say—now, again when you responded you said without any excuse. Without any legal excuse.

A Well, that's what you said. You said to use that as a judgment and that's what I was using.

Q I'm not arguing with you. There are some laws that I disagree with and I have strong feelings about. Even though that's the law, there is nothing that I can say that would change your mind about that, if it was proven that the person committed the murder knowingly and intentionally without any legal justification or legal excuse and you found that he did that beyond a reasonable doubt, you would never assess the penalty of five years confinement in the Texas Department of Corrections? There is nothing that I can say to change your mind about that or Mr. Cunningham or Mr. Nelson or Mr. Macaluso; is that a fair statement?

A That's a fair statement.

Q Any equivocation about that at all? **[1624]**

A No.

Q Mr. Vickery, thank you for being very candid with me and very open and that's what we want all jurors to do. Have you understood everything that I've said?

A I hope so.

Q When you say that you hope so, I've got to ask you, what do you mean?

A Well, you have to assume that I understand everything. You're using some legal terms and things that a layman like me is not accustomed to listening to sometimes.

Q I try not to use six-bit words.

A I know you do, but I'm just saying you start saying without legal excuse and things like that, I'm not accus-

tomed to hearing words like that and I have to sit here and sort them, you know.

Q Again, let's make sure that you understand that. When I said legal excuse or legal justification, those six-bit words, and really what they mean is self-defense, insanity, accident—

A Well, to clarify anything [sic], you're asking me—and there is some slight **[1625]** misunderstanding possibly, but you're asking me that, if a Defendant was found guilty without any legal justification or excuse, whatever the terminology would be, such as self-defense—

Q Insanity.

A —insanity, would I only give the Defendant five years minimum, would I consider it? I said no, I would not consider it.

Q So we understand each other then?

A Yes, I hope so.

Q I'm not talking about a situation where say a father comes home and his daughter has been raped or something like that and he finds out that it was the neighbor down the street and under the influence of that, he comes home, sees his daughter, he grabs his gun and runs down there and he blows John's brains out. That is not murder. That is voluntary manslaughter. It was done under the influence of sudden passion caused by the event itself. That's not murder and that's not what we're talking about.

A I understand that, yes.

Q Okay. Thank you very much, sir, for being candid.

[1626] MR. WEST: Your Honor, I would submit the juror for cause.

THE COURT: Mr. Nelson, you can take a couple of minutes.

[1627] EXAMINATION

BY MR. NELSON:

Q Mr. Vickery, I'm not going to argue with you, but you said just a couple of minutes ago—I know we've been

throwing a lot of stuff at you, a lot of legal terms that you've ever had to hear or deal with before. I want to go back into the range of punishment on a murder case because we talked about it for a couple of minutes when I was talking with you and I thought I remembered you telling me at that time that you could keep an open mind and consider the entire range of punishment.

Now, Mr. West is exactly right. We're talking about the knowing or intentional killing of another human being without any legal justification or legal excuse. If it is self-defense, if the jury finds it is self-defense, then the person is not guilty. If the jury finds that it was an accident, the person is not guilty. If it is an enraged killing, the immediately [sic] influence of sudden passion, that's voluntary manslaughter. Would you agree with me that there is—the best word I've found to use—a myriad of circumstances that **[1628]** could surround one person killing another person? I imagine if we sat here for days, we could come up with different fact situations and different relationships and that kind of thing that could enter into it. Would you agree with me on that?

A Yes, I would agree.

Q Okay. Now, you can consider, in a murder case—I can't give you any examples or facts. I'm not allowed to under the law, but you can consider the prior relationship between the parties. You can consider events leading up to the killing. You can consider all the surrounding facts and circumstances, things that have gone on for years and years between these parties, other relationships that enter into it. You can basically consider everything in a murder case.

MR. WEST: Your Honor, I would object. That is not a correct statement of the law.

THE COURT: Well, I'm not sure I understand the objection.

MR. WEST: It's an improper question.

[1629] MR. NELSON: Judge, I'll withdraw that.

THE COURT: Restate it because I think the objection is probably good because that's sort of a general phrase.

Q You can consider all of the pertinent, relevant surrounding facts and circumstances.

MR. CUNNINGHAM: That were admitted during the trial.

THE COURT: I think that is understood.

Q Well, if you don't hear it, you can't consider it, obviously?

A Yes.

Q You can consider all of that and we can't even ask you at this time, Mr. Vickery, to conceive of a situation in which you would give five years. You don't even have to be able to think of one. All you have to be able to tell us to be qualified is, if after you've heard all the surrounding facts and circumstances, you've heard everything about the person involved, you've heard everything **[1630]** you're going to hear about the Defendant that you have found guilt [sic] of committing this murder and you know everything you're ever going to know about this case, if at that point in your own mind based on the evidence and the facts and circumstances you believed that five years was an appropriate sentence, would you give five years?

A If I believed it, I would, yes.

Q That's all we're asking. All we ask you to do, Mr. Vickery, is keep an open mind and listen to the evidence and make a decision based on the evidence and I think you're telling me you can do that?

A Yes.

Q If the evidence in your mind justifies and calls for a verdict of life, you will give a verdict of life?

A That's right.

Q If the evidence in your mind justifies and calls for a verdict of five years, you would give a sentence of five years, is that right?

A That's right, but it's contradicting what I told Mr. West. You're **[1631]** putting it in a different phrase and terminology than he did.

Q I understand. We work with words obviously down here. If I wasn't correctly stating the law—

A But you asked me if I believed that five years was sufficient, yes, I would do that.

Q Okay. That's all we're asking, if after you've heard the facts, if you believe five years is the sentence that is justified and called for, would you give five years?

A If that's the way I believed, yes.

Q If you believed a thirty year sentence was called for, you would give that and the same with a sixty or a fifty-five or whatever, you would give whatever the evidence showed you should give within the range of punishment?

A Yes. You're talking about twelve people making the decision, are you not?

Q Right.

A We're debating it and discussing it?

Q Right. Each side, Mr. Vickery, is **[1632]** entitled to a jury of twelve people who can consider that entire range of punishment. If the facts show, assess the minimum. If the facts justify it, assess the maximum or anything in between.

A Yes.

Q You're telling us that you can do that; is that right?

A Yes, I can.

Q You may not even be able to conceive of a case. It may be a case that you don't see for the next ninety-nine years, but if it's here and it's justified, you will give the minimum sentence; is that right?

A If I believed the minimum sentence is fair, then that's what I will give.

Q Thank you, Mr. Vickery.

MR. NELSON: Judge, we submit that Mr. Vickery is qualified.

THE COURT: I will hold that he is qualified, Mr. West, but you have some time left.

[1633] EXAMINATION

BY MR. WEST:

Q Mr. Vickery, you indicated the difference in the language that we were using, what was the difference in the language?

A Well, sir, you asked me if a Defendant was proven guilty or found guilty of murder without any legal excuse, you asked me would I give him five years. You didn't ask me if I believed five years was sufficient would I do that. You just asked me would I.

Q Then you misunderstood what I said. I said under the appropriate facts and circumstances in your mind, could you assess a penalty of five years?

MR. MACALUSO: In a proper case.

Q In the proper case, could you assess a penalty of five years. Now, let me go back over it. This is what I'm saying: In [sic] a murder case where you found that a person knowingly and intentionally took the life of someone else without any legal justification or legal excuse, could you under the appropriate facts and circumstances in a proper case, **[1634]** assess the minimum of five years confinement in the Texas Department of Corrections?

A Taking all the circumstances, I would—you know, you would have to take all the circumstances and comprehend like it was explained to me. I could consider five years, but you put it kind of point blank to me. This guy is found guilty, can you give him five years for murder and I said I don't think so.

Q I'm saying under the proper facts and circumstances in your mind, could you not only consider it but, in the proper case, assess five years confinement. You know, it's one thing to say, yeah, I'll consider it, but in the proper case and if the circumstances warranted it, would you not only consider it, but also assess five years?

A I think if it warranted it. In other words, if the circumstances were presented to me for me to consider five years and I think five years would be a fair punishment do to the circumstances, yes. Prior to this you were implying to

me or I was interpreting that you were saying this guy is guilty, now can you just give him five years. **[1635]** I mean, there's no circumstances involved.

Q Again, it was miscommunication. I apologize for that. But you're saying that you could, in the proper case and under the proper facts and circumstances, consider and also assess a minimum of five years where you know that there is no legal excuse or no legal justification for the murder? He killed him and he intended to kill him.

A Depending on the circumstances, yes. It depends on what is presented to me to take under consideration.

Q And you can take an oath saying that you could do that?

A Yes, I could take an oath.

Q That's all I'm asking.

MR. WEST: Nothing further, Your Honor.

THE COURT: What says the State?

MR. NELSON: Judge, we would be pleased to accept Mr. Vickery as a juror on this case.

THE COURT: Mr. West?

Mr. WEST: Your Honor, we **[1636]** would exercise a challenge.

THE COURT: Mr. Vickery, you're going to be excused from service in this case, which means you can leave here and go back to your business. I appreciate your great patience with us. You've been very thoughtful. Good luck to you in your business

(Whereupon, Mr. Vickery left the courtroom and the following proceedings were held.)

THE COURT: My understanding from the lawyers is that the lawyers have agreed to excuse juror number thirty-four, Mr. Bogart and juror number thirty-six, who is Mr. Weaver; is that correct?

MR. CUNNINGHAM: That is correct, Your Honor.

MR. WEST: That is correct; Your Honor.

THE COURT: That leaves us

* * * *

[1796] EDWIN L. RAND,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there for a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks. Having had them as a child, I can sympathize with him. I certainly wouldn't want to have them at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will be our responsibility to [1797] handle this case for the State of Texas. We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand, good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miler-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there. Mr. Miller-El is charged with the offense of capital murder. That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group, kind of like you were this morning, and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here. The hope is, that because these issues are so serious and people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed, at least as you can be while you're up on the witness stand and we're out here. The big thing that we would like you to do is relax and remember, Mr. Rand, that here are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve in this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at this point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind on case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just be as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the same time I'm talking to you, if you will be as candid as you can be, then that will help us what we need to do and find out whether you're the kind of person suited to serve on this king of jury or not, okay?

A Okay.

Q Now, Mr. Rand, I feel like you have a right to know what our position is right now. Our position doesn't really count and your does, but I want you to know where we're coming from. The State of Texas is actively seeking the

death penalty for Thomas Joe Miller-El, that man sitting right down there. We feel like we could present to twelve jurors the type and the quantity of evidence that will convince them to find him guilty of capital murder and the type and quantity of evidence **[1800]** that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must assess the death penalty, period, no ifs, ands, or buts about it. If one of those questions is answered no, he must assess a life sentence. Again, he has no options, so its [sic] up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of time and we were shuffling in and out of the courtroom while you where trying to do it. Maybe over lunch you had a little but more time to think about it, but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any **[1801]** thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that same attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're not married, are you, Mr. Rand?

A No, sir.

Q Did you grow up here in Dallas?

A Yes, I did.

Q Are your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A No, I couldn't because we haven't talked about it.

Q You-all haven't discussed it at all?

A No.

[1802] Q Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to, what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder. Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here. As the judge mentioned, it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment, Mr. Rand, is that this Defendant, Thomas Joe Miller-El, did knowingly **[1803]** or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he cause the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should be considered?

A Yes, because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding things like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of the offense of murder. By the same token, if it's an accident, they didn't knowingly or intentionally cause the death of someone, but it was an accident, then it's not murder. It's a not guilty or maybe an **[1804]** involuntary manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense.

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes, sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and I don't really like to put people into categories, but I guess it kind of serves a purpose for me in this situation. I guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for moral or philosophical or religious reasons, whatever, **[1805]** they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that

strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not be involved in assessing the death penalty under any circumstances whatsoever. Can you give my an idea of where you fit in those groups?

A Probably in between the first two, sitting in the jury an being able to say, "Okay, he's guilty." and [sic] being able to do that. But again, somewhere along the line, I would probably think to myself, you know, "Can I do this?" You know, right now I say I can, **[1806]** but tomorrow I might not.

Q Okay. Well, let me just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract. We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real. We're here now and we're talking about that man sitting right there. In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find him guilty of capital murder. We will ask you to find that the answer to those three questions are yes, a yes answer to each of those three. Now what that means is, that man right down there, Thomas Joe Miller-El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and he will be strapped onto a gurney and an IV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected **[1807]** into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand, we feel like you need to know what you're getting into because once you have a seat over there, it's too late to say, "Hey, wait a minute, I just can't do something like that." Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want

to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case. Let me assure you of one thing. I told you that we have talked to thirty-seven people or thirty-six before you and we have two jurors. It's no great sin or it's not bad citizenship or something like that if you can't serve on this jury. It's a big decision and it's—

MR. CUNNINGHAM: You Honor, we're going to object to counsel for the State inferring that this **[1808]** panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled. Go ahead.

Q I don't mean to infer anything on way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it really comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect your deliberations or going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that. I go back to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case, I will a true verdict render according to the law and the law and the evidence. Some judges put so help me God on it and some don't, but that's the oath. You don't **[1809]** have to take the oath. If it's going to bother your conscience or you just don't feel that you can, in good conscience, do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now, I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and—

MR. CUNNINGHAM: Your Honor, we'll object to that. He didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to he statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first time he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO: That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at any time that misstates anything you've said or if there's anything you don't agree with. I hope **[1811]** you'll tell me. I think you will. You've been talking and you're strong enough to tell me if I say something wrong or something you don't agree with. I want you to, but I remember you saying a few minutes ago that, well, you could today, but you aren't sure of how you'll feel tomorrow. That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it

while in course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes.

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case, actually went out on punishment deliberations and put on the verdict form life of death. There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying that the jury has to answer questions rather than saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it.

Now I guess that's put in there **[1813]** as kind of a buffer and that brings me to my next question. If after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have the death penalty, period, he just must have it based on the facts, that's the way you feel, but we present evidence and we don't prove the answer to question number two is yes, in spite of your feelings and in spite of you thinking you're so mad that he's got to have it, that's all that is good for him, could you still answer that question not realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that he should get a life sentence, can you answer those questions yes knowing that results in him being executed, even though you personally feel he should get a life sentence?

A Yes.

[1814] Q Any problem with that at all?

A No.

Q Okay. Now, Mr. Rand, we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self-defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment, we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder, he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then, would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now, when we talk about murder, we're saying knowingly or intentionally caused the death of another individual. We aren't talking about self-defense where people were in **[1815]** a fight and one guy pulled a knife and the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident. We aren't talking about insanity where the law says the man was insane. We're talking about the person knew he was going to kill, intended to kill and killed without any legal justification or excuse whatsoever. Okay. Even if it was a killing in the heat of passion where someone is just so

enraged about something that had happened to a member of his family or something that they went and shot the guy that did it, that's not murder. That's voluntary manslaughter. It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, not in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentionally taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay. So you feel, if one person takes another person's life, that kind of—I guess the phrase I've heard used from time to time is an eye for an eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes.

Q Okay. Would you ever, ever consider a punishment as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says—the law sets out what the range of punishment is. I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling him what the range of punishment is and also telling him what the law says his **[1817]** duty would be.

MR. NELSON: I'm not trying to commit him, Judge. I'm just asking what he can consider, what he can think about, what his feeling are.

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you know, a lot of leeway here during voir dire to approach subjects the way

they want to as long as the get to the right point eventually. I think we'll see that, so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen of twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it improper because he **[1818]** left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case.

THE COURT: Reask the question, Mr. Nelson.

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty, right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, no accident, not self-defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen or twenty years, down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the **[1819]** State of Texas says that the maximum penalty for the offense of murder, not capital murder, but simple murder, is ninety-nine years or life and a fine of up to $10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum, is that right?

A Right.

Q If you had your personal way, you would want to consider the death penalty in that situation?

A Well, if it was proven that it was a capital murder.

Q Okay. That's all we ask. Obviously, you can't give the death penalty for a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the proper facts and circumstances, give a sentence of five years for knowingly and intentionally taking another human life?

MR. WEST: Your Honor, **[1820]** again, improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the fact and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case, if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that five year sentence was proper could you assess it?

MR. RAND: Yes, if that's the sentence that could be given.

THE COURT: Go ahead, Mr. Nelson.

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to be given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on a murder case, to give five years. You can give anywhere up to life or ninety-nine years, I thought I heard you saying—and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what the law required or if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q Okay. Somebody is not going to tell you that you have to give five years. That's your decision. If you can't

consider and assess five years, under the proper facts and circumstances, then that's fine. Nobody is going to argue with you, but we're just trying to find out because, again, we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. This is part of that, so I guess I'll ask the question **[1822]** again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

Q Okay. Are you telling me, if the facts and circumstances—well whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the—what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years.

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death. If you were setting the laws, you would allow death to be considered, is that right?

[1823] A Yes, I would have to consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is an improper question. Improper question in that the question should be, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson described it?

THE COURT: Do you understand the question, Mr. Rand?

MR. RAND: I think so. What he's saying, warranted, does he mean, okay, this what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly. Mr. Nelson, go ahead. **[1824]** Reask the question.

Q Mr. Rand, again, when we talked about—when you've heard me use the work warranted, no one is going to dictate to you as juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else. If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse. Are with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence for five years in the Texas Department of Corrections for the offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that **[1825]** part that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it.

THE COURT: Go ahead ask the question.

Q Mr. Rand, let me just put it as simply as I can put it. Would you ever feel five years was justified under any facts and circumstances for the offense of murder?

A No.

THE COURT: What was you answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making

the laws yourself, you would feel that death should be proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of **[1826]** Texas for the offense of murder as I've stated if out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

Q Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense; is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the question. It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it out?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question **[1827]** again or I'm going to take it over.

Q Mr. Rand, am I confusing you?

A No.

Q You think you understand what I'm asking?

A Yes.

Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now. If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.

A Okay.

Q I thought I understood you to say, if you could set the minimum, you would set the minimum at life or ninety-nine years and you would have death be a consideration?

A Yes.

Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?

A Right.

Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and **[1828]** I'm not. I would guess from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change you mind on it, would I?

A No.

Q And that's the way you feel about it and that's the way you're going to feel about it; is that right?

A Right.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change you mind at all. I guess nobody could, if they wanted to; is that right?

A Right.

Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion and that's why we have up here, is to find out how your feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about [sic] of time and I've thrown a lot of stuff at you. You've been very open and honest with me and I appreciate that. Do you have any questions for me? Is **[1829]** there anything else we need to touch on here that I haven't touched on?

A No. I think everything is pretty clear right now as far as what you've asked me. I think I've understood everything.

Q Okay. I don't think I have any other questions for you, Mr. Rand, if you don't have any for me. There's no way, even if I kept discussing it with you, I could change your

mind, so I'm not going to bother you any more. I appreciate very much your time and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit. Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST:

Q Mr. Rand, my name is Royce West. How are you doing this afternoon, again?

A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay, I'm not going to argue with you about anything, either , okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matters. There's no problem with that at all. It's okay to feel about different, controversial subjects the way that you feel about them. I'm not going to argue with you about that at all. In fact, I would defend your right to say what you want to say. Do you understand what I'm taking about?

A Yes.

Q Okay. Now, is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is.

Q Okay. Do you consider yourself basically a law and order person?

A Yes.

Q Do you feel as though you follow the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay, How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes.

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay. Now, no one is trying to get you to commit to anything. You realize, as **[1832]** he indicated, the minimum for murder is five years and the maximum is ninety-nine years, life and an option of a fine of $10,000,00. Our legislature set that range of punishment. The people down in Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that fall within that range of punishment, so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay. Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but I'm asking you, if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that

under those facts and circumstance that you would, number one, consider and, if you felt as though the circumstances and the **[1833]** facts called for it, assess penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years or life. I'm asking you, could you consider, under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to.

Q Okay. If that's what the facts called for?

A Yes.

Q Now, let's explore that a little bit more. You said if you had to. You don't have to do anything.

A Right. Well, when I said that, I was meaning as to what you added onto it, if the facts—

Q If you felt the facts called for it?

A If that's what it called for, yes.

Q I'm kind of misunderstanding you. **[1834]** You said if that's what it called for. What do you mean?

A Okay. When I said that, I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could.

Q Now, what I want to make sure that you understand, no one is trying to commit to saying " I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life. In your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any

legal justification such as self-defense or any legal excuse such as insanity, that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment, for five years to life, **[1835]** and a $10,000.00 optional fine. I can consider it and, under the proper facts and circumstances in my mind, if I felt as though the facts warranted it or justified it, I could give that person five years?

A I could consider it.

Q And you could do it if you felt as though the person should receive five years; is that correct?

A If I felt that.

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying, if you felt as though the facts and circumstances called for it, that you would give a person five years?

A I would consider it.

Q You said that you would consider it?

A Yes.

Q The law requires—and this is the law—that you not only be able to consider it but you would be able to do it, also, if you felt as thought the facts called for it, I'm not trying to get you to commit to it. I just want to make sure you have an open **[1836]** mind to it.

A Well, I think I could, but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well, if we don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it. Now, whether I would like to or not, in my own opinion, I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that. I'm just saying, if you felt as though the facts and circumstances called for it in your mind—again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and internationally took the life of someone else without and legal justification or legal excuse. I'm saying, you know, would you keep **[1837]** an open mind and, if you saw those facts and circumstances would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either, but I want you to be able to, if you can, and you said that you could, consider the full range, from five years to life, and, if the facts and circumstances, in your mind, called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum of life, which you have to call it like you see it. Do you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this—Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying **[1838]** or what?

A Well, maybe what I was understanding from him was—they way I took it was what would I do. Okay, Your question was, could I consider or be able to. Yes, I could. Under his consideration, I would want more, but I could consider and give five years if I had to.

Q If you felt it was—

A Well, If that was that was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying. You know you may very well want to—let's get off that for a second. I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology. The first three years I was in automotive.

Q I was noticing some of the literature that you've read that dealt with **[1839]** automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay. Would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice—have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought.

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime of, say, murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's it and maybe a guy that **[1840]** steals something from a Seven-Eleven has to go for fifteen.

Q So unequal justice?

A Yeah. You know, it sounds kind of funny.

Q What doesn't sound—

A Me, myself, being on the outside; I'm looking at what is there on the paper in the news. I don't know the facts or anything, really, behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five for a killing.

Q Do you understand that there are probably a lot variables that you and don't know about?

A Yes. That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trial before the Court, There are a lot of variables involved; **[1841]** do you understand?

A Yes.

Q It gets basically back to what I was talking about. There's a wide range of punishment open for various types offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder, just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine year or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies, also. Now, the only thing that the law requires, in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-

nine to life, and, under the appropriate facts and circumstances, in your mind, if the facts called for it and you [1842] feel as though it's justified, be able to assess the minimum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response.)

Q Again, this is an individual thing, being able to consider it and, if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q Now, you're telling Mr. Cunningham and myself, as Mr. Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir.

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury. Thank you, very much,

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr. Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing I want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used, you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense; is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond and reasonable doubt that this defendant knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract. We're talking about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury. We're just asking you to be as honest about it as you possibly can be. I know that's what you're been trying to do, but being just as honest about it as you can with us and with yourself; could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your honor, we'll object to that as an improper question in that, if he felt that the proper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh-huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, "I'm not just thinking about it. I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. If the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson, one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really feel okay. You've convicted somebody of murder, not voluntary manslaughter, not self-defense, no accident. You've convicted them of murder, knowingly or intentionally causing the death of another human being and you've found them guilty beyond a reasonable doubt and you're sitting on the jury. You've heard all the facts and circumstances. You know everything you're going to know. You've said, in a proper case, you could consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. Am I right about that?

A Yes.

Q Okay, so even if the facts and circumstances justified it where you could consider it, being real honest about it, could you give it?

A Yes, I could.

Q Is there any question about that, because you've changed from what you told me before?

A No—well, I don't know. From the first time you asked me to now, if maybe the way you said it or my understanding was different, but I could consider it and, if shown, yes. But under the same token, I would think that I would want more. If it was proven, then okay, he gets 99 years. I would go that way, also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the state's time is up. We keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances, he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question and now he's going to something else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judge, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying that you would do it.

A I could consider it but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already **[1850]** answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and you're probably tired of these lawyers asking you questions, but let me sum it up to make sure that I understand. The law says that everyone of these twelve jurors who are going to be sworn in this case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now earlier on—and we're not even arguing about this—you told the State that, in a capital murder case, if they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a **[1851]** Defendant guilty of the offense of murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one, but in any murder case—is a prison sentence of not less than five nor more that ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00, if the jury wants to fine in addition to a prison sentence.

Now, what the law say is each juror who is seated must be able to set a punishment somewhere within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then **[1852]** you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words you don't have to be able to tell me, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact, the law wouldn't even

let you do that because that means in my mind and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts **[1853]** it would take you, in your mind, to vote for some particular punishment. The law does say that you have to have an open to the entire range of punishment so, if you heard a set of facts in a murder case, after hearing all those facts and those circumstances, having found the Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in that case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't?

MR. RAND: Yes.

THE COURT: I'll hold that he's qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record **[1855]** to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand, thank you for your patience with us, first of all. You will be excused for service in this case. If you would leave your badge with the bailiff as you go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category one where he could serve on the jury or category two where he could not. That was the **[1856]** State's concern for exercising a preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

Mr. MACALUSO: Judge, If I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make nonlegal objections, the Court call it to our attention, as I've asked the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor, the only reply we would make to

* * * *

[2000] CARROL S. BOGGESS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me be-

gin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that I'm pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr. Cunningham. Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue suit there. His name is Thomas Joe Miller-El. He is charged with capital murder and he's the Defendant. Now, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. I would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the district clerk's office. I think I know—

A I'm sure you know him. He's been here a while.

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is convicted of capital murder. You know if a person like Thomas Joe Miller-El is convicted of capital murder, then he can receive only one of two possible penalties. One is a sentence of death by lethal injection **[2003]** in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you **[2004]** a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing you can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the witnesses and the lawyers and so forth. If there is anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what our position is and what we intend to be able to prove and establish once the trial itself begins and then, of, course, what would be expected of the jury on the basis of that evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the qualify of evidence—and that would mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions that the judge will give the jury at the end of the **[2006]** trial should be an-

swered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to betaken some day down to Huntsville, Texas and at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes. are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. Boggess—you're thirty-seven years old and you know the difference between fact and fantasy or something you hear on TV or read **[2007]** about and then something when you're caught up right in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of

their personal or conscientious feelings or religious or moral **[2008]** feelings one way or the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time to really think about it, but could you share with us, Ms. Boggess, now that you've had a night to sleep on it, to think about it, what your feelings are really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a murder—you know, intended to do something like that, then I would feel that it was my duty to judge that **[2009]** person and to decide whether or not that person, you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. Acapital murder involves a murder itself. That's a component of capital murder. It's **[2010]** what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing him, I cannot receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls under a particular category. For example, if he is a police officer and I murder him and I know he is a police officer, he's on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offence. Murder is a situation **[2011]** where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you, don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then **[2012]** you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

Q Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, **[2013]** whether it be capital murder or shoplifting. The first part deals only with whether or not a person is guilty or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously, the trial is over. If you find the person guilty of capital murder, then we go on to the second phase of the trial where the penalty is determined. There is nothing automatic about somebody being given the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there **[2014]** is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part of the trial, heard all of the evidence, they would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get some number of years. It's like in the movies. You know, you've seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, **[2015]** you know, we have to rely—everyone here has to rely on your service as a juror on what you tell us now. There will be times when I talk to, you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone elsehere would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kind of pin you down on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though

it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that is, in question fifty-eight it says here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a **[2016]** verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you **[2017]** or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to be an easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you know, being a **[2018]** part of someone else being executed, they simply feel that would be a violation of their longstanding personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. He said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the **[2019]** result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. He has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting

at? If a person is on a jury that last yes equals death. Do you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on this jury and participate in the execution of another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you **[2020]** would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair, but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty-nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a **[2021]** jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because

of my personal beliefs or my conscientious beliefs, my religious or my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I **[2022]** don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.

Q Which one is that?

A I probably would pick the first one.

Q You do believe in the death penalty?

A Yes.

Q And you say you could serve on the jury?

A Yes.

Q Even though it meant that it might be a tough decision?

A Yes.

Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?

A Yes.

[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?

A Yes.

Q Is there any doubt in your mind about that at all?

A I could always tell the truth.

Q That's all you're expected to do. We have to come forth with the evidence to satisfy you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, ,you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for **[2024]** death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.

Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?

A Uh-huh.

Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three **[2025]** questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be answered yes. In which case, you know, your oath as a juror would require you to answer the question no. Could you do that, go ahead and an-

swer the question no knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer **[2026]** that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect.. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to discuss it at this time. You know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's **[2027]** couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the

death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged murder during a burglary, a capital murder. We proved the murder. There's no doubt about it. You don't have any doubt that the Defendant **[2028]** killed somebody with no legal excuse and no justification for it under the law at all. It was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life or death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital murder, but regular murder, then you **[2029]** must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you

must exclude what I said earlier, self-defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self-defense because, as I said earlier, if you believe someone killed somebody in self-defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self-defense. If you think someone killed knowingly or intentionally in self-defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not **[2030]** murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person knew he was going to kill somebody, intended to kill, somebody and did it, no insanity, no accident, no self-defense and no heat of passion, what do you think the minimum

ought to be, Ms. Boggess, **[2031]** for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the form of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety-nine years or life, didn't I?

Q That's what the law says, that the range of penalty for murder is five years to ninety-nine years or life. The law expects a juror, if he can. [sic] to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. we're asking you.

[2033] A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the **[2034]** death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five **[2035]** years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you :ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and how my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death **[2036]** sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I

wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, **[2037]** I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038] EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess.

Q Ms. Boggess, my name is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that E or F?

A F, Oak Cliff Bible Fellowship.

Q Where is that located?

A It's on Camp Wisdom in Dallas.

Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and peppered?

A Yes. He is crippled.

Q Oh, he works in the back. I've **[2039]** known him a long time. This is for the purpose of the record. What is your race?

A Black.

Q She's taking down everything you say and unless we ask you, it's not in the record. Do you teach Sunday school?

A Yes.

Q You're a member of the Visiting Nurses Association?

A Right. I'm a therapist.

Q Do you know Etta Bernice Johnson?

A Uh-huh.

Q How long have you known Etta?

A I don't know her personally. I just know her name.

Q She is also a member of your association?

A Yes.

Q You live at 5717 Fox Hill Lane?

A Right.

Q How long have you and your husband and children lived there?

A Almost eight years.

Q Are you and your husband buying your home there?

[2040] A Yes.

Q Two of them attend public school?

A Yes.

Q Is it public or private?

A Public.

Q Where does Ke'Andra go to school?

A Atwell Junior High.

Q And your son goes to school where?

A Turner. All three of those are boys.

Q Have you taken any other courses above your BS degree?

A No.

Q You don't remember what security agency your husband used to work for?

A I think it was Preston or something like that. I don't know if they're still in business.

Q What did he do for them?

A He rode the Surtran buses and monitored the bus drivers.

Q You've never had any criminal jury service?

A. No.

Q How many times have you been **[2041]** called down?

A I don't know. I've only served once.

Q At least one time you served on a civil and while—or you took a recess and they settled it?

A Yes.

Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?

A Uh-huh.

Q If you were chosen as a juror in this case would you hold them to their burden of proof?

A I beg your pardon?

Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?

[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, guilty. That's what the law expects and you that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case. We appreciate your attention down

here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings **[2043]** were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, **[2044]** Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; Hilbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, **[2045]** Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman—

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in **[2046]** the shape that you-all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I'm sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you-all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2170] WAYMAN A. KENNEDY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Kennedy. I want to start out by reintroducing everybody who is sitting here. You met almost all of us yesterday. My name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso and the gentleman seated behind me here is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas and

we've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Kennedy?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Mr. Kennedy.

[2171] Q These two gentlemen have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-El. He's the man down at the far end of the counsel table. I think you can see him if you lean forward there.

As you know from yesterday Mr. Miller-El is indicted and charged with the offense of capital murder. That's the most serious criminal offense anyone can be charged with in the State of Texas. Now, Mr. Kennedy, I don't believe from looking at your sheet that you've been on jury service before; is that right?

A That's correct, I haven't.

Q Now, if you remember yesterday we were in here and you were in a group of about forty people out there. On most normal cases you would have remained in the group like that for us to talk with you. We would have asked you some questions out there and pointed some things out to you in front of the group. Because this is a death penalty case and it is a situation where people have very strong feelings on both sides of some of these issues **[2172]** that we're going to talk about, the law allows us to talk to you individually like we're doing here. I think the hope is that, if you're in here by yourself, you will be able to be a little more comfortable and a little more open with how you feel about things than you would be if you had to talk in front of forty or fifty other people who are sitting out there.

What I would like you to do is the same thing the Judge told you to do and that is relax just as much as you can. Remember that there are no right or wrong answers to anything I'm going to ask you or these gentlemen may ask you. We're just trying to find out how you feel about some things.

Now, Mr. Kennedy, we've talk to—you're the forty-second person or forty-third person we've talked to in one way or another on this jury. At this time we have three jurors. You can see that it is a rather tedious process, number one, and the great majority of the people, for one reason or another, have not been suited to serve on this particular jury. We're going to talk to you about some things that you may or may not have some strong **[2173]** feelings about and I hope when you do have, you will express those. I hope, if I talk too fast or say something that isn't clear or you have questions, I hope you will stop me, so we can get those cleared up while we're talking here today. I want to be sure we're understanding each other on what we're talking about.

A All right.

Q If you will bear with me, here we go. Now, Mr. Kennedy, I feel like it is only fair that you know from the outset what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present twelve jurors, to you if you're on that jury, the type and quantity of evidence to convince a jury to find Mr. Miller-El guilty beyond a reasonable doubt of capital murder. We further anticipate that we can present sufficient type and quantity of evidence to have a jury answer those three questions that you see on the boards yes.

If those three questions are answered yes, each one is answered yes, it **[2174]** results in the death penalty as a matter of law. There is no option. The Judge doesn't have an option to do anything different. Three yes answers equals the death penalty. We anticipate—

A The jury is the one, if they answer the questions correctly, the Judge cannot change it?

Q That's correct. The Judge has no option whatsoever. If the jury comes back and answers each of those questions yes, yes, yes, Judge McDowell has to, under the law, and is required to assess a death sentence for Thomas Joe Miller-El. If one of those questions is answered no, then a

life sentence is assessed. The Judge has no option whatsoever in either case. We anticipate, Mr. Kennedy—being very open and honest about it—if those three questions are answered yes, at some point Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death and **[2175]** his life as the result of the verdict in this case if those three questions are answered yes.

I feel like it is only fair to you that we're clear about it and you know where we're coming from on this thing and that's why I tell you that so you know what you're dealing with because I would guess coming in yesterday most people feel, well, maybe I'll get on a civil case or I'll be on a little theft case or something like that.

A Yes. That's the normal feeling.

Q And then you walk in and you get hit with a capital murder, I would guess it's a little bit of a surprise, a little bit of a shock?

A Yes.

Q You did have a chance yesterday to fill out a questionnaire. I know everybody was in and out of the courtroom and back and forth and in the hall and back in the courtroom and so on, so you didn't really have a whole lot of time to sit down and concentrate on answering the questionnaire, but there was one question on there about the death penalty. You answered it, but you've had a chance to sleep in it a **[2176]** little bit, to give it some more thought, I would guess, since then. Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

A Well, my feelings are kind of like what I said on the questionnaire, that I really don't believe in it only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder

type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that. Normally I wouldn't say on just the average murder case—I would say no, not the death sentence.

Q Okay. Well, let me just take a couple of minutes to explain a little bit about the Texas law with relation to the death penalty. The death penalty is an option in Texas only in cases of what we call capital murder. That's murder, number one, but murder in a special situation. For example, if a certain class of persons is killed, murder of a **[2177]** police officer or a fireman on duty, a prison guard, something like that, or a murder for hire fits in there. Second is one that you mention, a mass murder like the incident' we had here a, year or two ago. The third one is what we're dealing with here, Mr. Kennedy, and is something we call murder plus, for lack of a better name, I guess.

We have to prove, number one, that the individual committed the offense of murder but that he did that while in the course of committing or attempting to commit another offense, burglary or robbery or rape or arson, for example. Specifically in this case we're talking about murder in the course of a robbery. Now, the law in the State of Texas says that the death penalty is appropriate in those cases. It can be considered in those cases.

I guess what I would like to know from you, first off, Mr. Kennedy, based on what you just told me, do you feel like the death penalty should be appropriate in cases like that or are those not serious enough?

A The circumstances around it, or **[2178]** are you saying a small—you know, what type of robbery was it? Was it a small robbery like where he held up somebody in a back alley or something and shoot them because they won't give him their money or are you talking about like a bank holdup where you shoot an armed guard or what?

Q I'm not allowed, Mr. Kennedy, under the law, to go into any of the facts of this case. None of the lawyers can and the Judge can't at this point.

A So that is the kind of thing that would weigh my decision as to why a person should be put to death for shooting someone during a robbery. To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough and make sure that person never comes up for parole.

Q I'm sorry. I didn't hear what you said.

A I said like a life sentence where they wouldn't never come up for parole. If the crime was severe enough—well, I have a question and a statement. Some people are put into prison with never coming up for parole, **[2179]** right, and some life sentences still come up for parole in like twenty years or something like that, right?

Q I can't go into the parole laws or anything having to do with that.

A That's what I'm saying. My opinion would be just like lock them up and he would be without ever coming up for parole. It would be a life term sentence.

Q Let me go just a little bit farther and see—I can't go into the facts of the case, but let me go a little bit farther and see where we wind up. If a person is convicted of capital murder—and we've alleged basically this in the indictment, Mr. Kennedy; That this Defendant did knowingly or intentionally cause the death of another individual and that he did it while in the course of committing or attempting to commit robbery. That's not word for word, but it's basically what the indictment says. If you as a juror or if the jury convicts a man of this offense, capital murder, there are two possible punishments under the law, life—and that life sentence is subject to the same rules and **[2180]** regulations and considerations and restrictions as any other life sentence in the State of Texas, all the same, or a death sentence. Those are the two options. If he is convicted of capital murder, it goes to only those two options. That's what we're dealing with. That's about as far as I can go without going into the facts.

The law in the State of Texas says the death penalty is appropriate for consideration in this type of case. In order for a person to be qualified to serve as a juror, they have to

be able to understand that and not have such problems with it that it would affect their deliberations in the case.

Now, what is going to happen in the procedure basically is this: This trial is what we call a bifurcated trial. There are two stages. First of all, there "is the guilt, or innocence phase of the trial. It's at that point that we have to prove to you, number one, that the Defendant committed the murder and we have to go further to prove that he committed that while in the course of committing a robbery or attempting to commit a robbery. Am **[2181]** I clear with you so far?

A Yes.

Q If we prove that to you beyond a reasonable doubt, the it is your duty as jurors and as a jury to find the Defendant guilty of capital murder. If we fail to prove that to you beyond a reasonable doubt, it is your duty to find him not guilty or, if we prove some lesser offense, to find him guilty of that depending on what the facts show.

A That's understandable.

Q Assuming that he is convicted of capital murder, then we move to the second phase of the trial, that being what we call the punishment phase of the trial. Now, under the old law, up until about twelve or thirteen years ago or something like that, the jury on a capital murder case listened to the evidence and went out into the jury room, took the verdict form and they put life or death and signed their name and that's all there was to it. That was the verdict. Again, the Judge had no discretion. If the jury said life, he got that life sentence. If they said death, he got the death sentence.

[2182] Today the legislature has done things a little bit differently. They have set out three questions that must be answered. After hearing all of the evidence, you as a jury, if you're on that jury, will be asked to answer those questions either yes or no. Why don't you take just a minute to look at those questions and read them over?

A (Juror complies.) Are the blanks left for the name?

Q Those will be names, yes, sir. Have you had a chance to read those over?

A Yes, sir.

Q Now, I don't know why the legislature in their wisdom set up the questions rather than just asking the jury to write life or death. The thing I want you to understand, Mr. Kennedy, if the effect is the same. If the jury answers those three questions yes, he gets the death penalty, period, end of story. That's it. We anticipate, if those three questions are answered yes, at some point this man sitting right down here will have his life taken by the State of Texas. If one of those questions is **[2183]** answered no, he gets a life sentence. Again, there is no option. It's that same life sentence that we talked about.

Now, you've indicated that you have a real question whether you feel the death penalty is appropriate in this type of case, a murder plus a robbery.

MR. CUNNINGHAM: Your Honor, we'll object to that statement. That is an improper statement of what this prospective juror has said.

THE COURT: I'll overrule that. I think Mr. Kennedy understand the question. Mr. Kennedy, let me tell you, if you don't understand any question the lawyers ask or want it clarified, please let us know. I'm counting on you to do that. Go ahead.

A Repeat the question again.

Q Okay. Mr. Kennedy, first of all, let me say one thing. There is no way I want to or would try to put any words in your mouth or argue with you or force you to say anything **[2184]** that isn't what you feel or what you believe. So if I misstate something or if I say something you don't agree with, I hope you will tell me. I think you're strong enough that you will tell me if I say something wrong.

A I will.

Q Okay. I thought you told me that you had some questions or some reservations about the death penalty being appropriate in this type of case; is that right?

A That's right.

Q Okay. First of all, let me tell you this: I think I told you that we've talked to about forty-two or forty-three people or something like that and we only have three jurors at this point. The people that we have excused or the people who aren't suited to serve on this jury aren't bad people. If you sit on the jury, you don't get brownie points and if you don't sit, you don't get any demerits as far as citizenship or anything like that. It's a difficult case. There are going to be difficult decisions to be made and what we're looking for is twelve people who can follow the law and make those decisions. If **[2185]** somebody can't do that or would have problems doing that, then we don't want to force them to sit on the jury.

A This, I understand. I can understand that because what you're saying is, you don't want somebody who has already formulated an opinion before the trial even starts.

Q Exactly.

A That's just like what I was telling you. The reason my thoughts are different for the death penalty versus a life sentence may be because I haven't heard the evidence on it. That's the reason I said that mine are different on the situation, the way I look at it, the way I would feel.

MR. WEST: Mr. Kennedy, would you speak into the microphone. I can barely hear you.

A As I was saying, it would have to be like the circumstances—I would have to see—you know, before I form a complete conclusion as to what because I don't about people, but myself, before I would say I would **[2186]** go along with the death sentence in some cases and some cases not, as I stated briefly on that, mass murder or something, yes. It also depends on how much—someone else in another situation might give a life sentence. That's the only thing that I'm saying.

Q You're right, Mr. Kennedy. We want twelve people that have an open mind sitting over there. We don't want, and we're not going to have, twelve people over there frothing at the mouth and jumping up and down to execute somebody. That's not what we're going to have on this jury. By the same token, we need twelve people who can realize that they're going to make a decision with reference to these questions and can make those decisions without being affected by their personal feelings about whether the law is correct or not or their—if they don't feel that the death penalty is appropriate in this type of case, then they have trouble, a person would have trouble answering those questions one way or the other. We want twelve people who can answer those questions and make those decisions and handle that without reservations. Whether **[2187]** the questions are answered yes or no, they can make that decision.

I know you're in a difficult position because we can't tell you what the facts are and we aren't allowed to because you have to hear them from the witness stand.

A I can understand that.

Q If I told them, Mr. Cunningham or Mr. West probably would tell them a different way and none of that is evidence. The evidence comes from up there, so we can't even go into an example of what some facts might be. Understanding that we're dealing with murder in the course of a robbery of one individual, an individual by the name of Douglas Walker in this particular case', but one individual, he's killed while in the course of committing a robbery, is, in your mind, the death penalty appropriate for that type of case, understanding that you don't know the fact's of this case, but for this type of case, the death of one person during a robbery?

A There again, you're asking me something—it's kind of hard to say because one thing, you would have to formulate an **[2188]** opinion and my opinion would be—for one thing, I don't know all the facts. I guess what the law is saying—the state law says that it is okay to do it because you said that the state law says that a person can be put to death for doing it, so are you saying what are my feelings of the law or what?

Q I want to know—we know what the law is. I want to know how you feel, what your personal feelings are.

A To me, it would depend on the circumstances.

Q Okay. We don't want to force someone, Mr. Kennedy, to take an action or to enforce a law that they have strong feelings against or that they don't agree with.

A As I stated earlier, if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances. I would have to see more to say yes because I do have reservations about it.

Q You looked at those questions a few moments ago and read over them. **[2189]** Understanding that a yes answer to each of those questions results in a death sentence—

A Because you said—I know deliberately—and just picking something out of each one—you think they would commit another crime—I would say yeah because that person, if they was committed to a life sentence, you're not going to let them go back out into society, anyway, again, so the death sentence probably would be okay.

REPORTER: I didn't get that last remark.

A I said the death sentence probably would be okay because, if you're going to put a person away forever and if the crime was bad enough, then I would say yes, the death sentence would be all right.

Q Let me go a little bit farther and ask this: I told you that the legislature put those questions in rather than just have the jury write life or death. If you were on the jury and you, after hearing all the facts, felt that this man did not deserve the death penalty, those were your personal feelings, and nevertheless we have proved to you that a yes **[2190]** answer should be given to each of those three questions, would you give a yes answer to each of those three questions knowing it would result in the death sentence even though your personal feelings were that the man should get a life sentence?

A I don't know. It would depend on the evidence.

Q We have to prove to you that those questions should be answered yes and that burden of proof is here on this table and stays here. We have to prove it to you, but assuming we proved to you that the answer to those questions should be yes, even if your personal feelings are such—you know how when you hear about something or you see something or you listen to something, you tend to get personal feelings, well, this ought to happen, an emotional or gut reaction type feeling. If your gut reaction and your emotional feeling is that the man deserves a life sentence and should not be executed, but nevertheless we prove to you that the answers to those questions should be yes, could you and would you answer them yes knowing it would result in **[2191]** the death sentence even though that's contrary to your emotional or gut reaction?

A Yeah, if it was proved, like I say, without a doubt. You have got to prove it without a doubt.

Q Now you said "without a doubt."

A What I mean is, the evidence has got to be convincing enough.

Q Beyond a reasonable doubt?

A Yes.

Q On TV you hear beyond a doubt—

A That's right, but that's basically what I'm saying. The evidence or whatever you would present would have to be convincing enough.

Q If we convinced you beyond a reasonable doubt, you could answer those questions yes? Even if you didn't personally or emotionally want to give him the death penalty, you could answer those questions yes?

A Yeah—you said personally?

Q Right.

A Yes.

Q In other words, your personal and emotional reaction is this guy does not deserve **[2192]** the death penalty. He deserves a life sentence not the death sentence. We

proved to you that those questions should be answered yes, could you answer them yes?

A It's kind of a contradicting statement. You're saying would my convictions that I believe that it should be a life sentence, but then you say you proved to me that—could I state the death sentence and answer those questions yes. Those are kind of contradicting statements.

Q They sure are, but that's why the questions are there. The legislature—I don't know what their reason—maybe they wanted to put a buffer in there between a person's emotions and the actual verdict. What the legislature has said is that those questions should be answered based on the proof. What I need to know from you, Mr. Kennedy, is, if those questions are proved, a yes answer to those questions is proved, could you answer them yes even if you personally felt that the man should get a life sentence rather than the death sentence? You know, if you were just going to write on the verdict form life or **[2193]** death, you would write life?

A Uh-huh.

Q But we have proved that each of those should be answered yes. Could you nevertheless answer them yes?

A Yes, I believe so.

Q You think you could?

A I think I could if it was proven.

Q We have to prove it to you.

A It's got to be proven.

Q Okay. Now, when we're talking about proof, one other thing that may come up in this case—we don't anticipate that it will, but it may. You remember I told you that we call this a murder plus. For simple murder in the State of Texas, the death penalty is not appropriate under the law. It's not a consideration. If we prove to you that the person knowingly or intentionally caused the death of another human being, the death penalty is not appropriate. It's a different situation.

We talked about murder and there is no first degree, second degree or third degree murder in Texas. It's just murder. **[2194]** What that is, is knowingly or intentionally causing the death of another individual. We aren't talking about self-defense. If it was self-defense, the person would be not guilty. If it was an accident, the person would be not guilty. If it's a killing in the heat of passion—for example, you have some children and I have a little four year old girl. If I came home and found out somebody had raped my little four year old girl and the guy that did it is standing down the street laughing about it, I might very well take a gun and go down there and do a little justice of my own in that situation.

A I can understand that.

Q A killing in the heat of passion, that's not murder. When we talk about murder in the State of Texas, we aren't talking about insanity. If a person is insane, they're not guilty. We're talking about the knowing or intentional taking of another human life without any legal justification or excuse whatsoever. The guy knew he was going to do it and he intended to do it and did it without any legal justification or excuse whatsoever.

[2195] Now, the maximum sentence for something like that is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?

A Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.

Q It's either murder, knowing or intentional taking of a human life or it's not murder.

A A person just plans to go out and shoot someone, you know, like I go out and shoot the first person I see or I shoot the first black or white or something like that, you go out and shoot someone like that, that person, I'd say, the

minimum would be life because they shouldn't even be in society.

Q Okay. I'm not quite sure how to go from here, but murder can come up in a variety of situations. You would agree with me on that?

A Yes.

Q Again, we're not talking about **[2196]** self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—

A I know you said the minimum. The minimum amount that I would say would be at least twenty years.

Q For the taking of another human life?

A Yes.

Q Without any legal justification or excuse?

A At least twenty years with no parole.

Q And no parole in it?

A Right.

Q Okay. Mr. Kennedy, could you—again, for the knowing in intentional taking of another human life without any legal justification or excuse,, no matter what the facts and circumstances were—again, we're not talking about self-defense or accident or killing in the heat of passion. We're talking about murder. Could you under any set of circumstances, no matter what the facts and circumstances were, ever assess, actually give, **[2197]** a five year sentence?

MR. WEST: Your Honor, I would ask that sentence be completed, if he felt as though a sentence of five years would, in fact, be warranted, if he felt in his mind that it would be warranted.

MR. CUNNINGHAM: Your Honor, we would also further object that the State has not advised Mr. Kennedy that the statute in Texas provides that the minimum punishment is not less than five or more than ninety-nine or life. I think it is an unfair question to this prospective juror to ask him about a five year sentence and not tell him that the statute says he can give five years.

THE COURT: I think his question included that five year minimum, but reask the question, Mr. Nelson.

Q Mr. Kennedy, basically what I'm **[2198]** asking is, I want to know your personal feelings. We've talked about, through this whole thing, your personal feelings. That's what we're interested in. Could you—and I'm not going to go back through the whole thing again—for the knowing and intentional taking of another human life without any legal justification or excuse, under any facts and circumstance no matter what they were, give, assess—if the law allowed you to give five years and it was proper to give five years, could you ever give five years?

A Here again, like I say, it depends on the circumstances. I know I probably wouldn't, no. Right off my head I would say no.

Q Okay. No matter what the facts and circumstances showed?

A You know, you're saying just straight out and out, yeah, but if it was something different like where he had maybe—you know, in the heat of passion or self-defense or something. If it wasn't that at all, it was just an out cold-blood murder, then no. I would say at least twenty years.

[2199] Q Again, if it's the heat of passion, it's not murder. That's what we call voluntary manslaughter.

A Okay, but that's still going to carry some time with it, isn't it?

Q Sometimes, but we're not even talking about that. We're talking about something more than that. We're talking about murder. We aren't talking about self-defense. We aren't talking about accident. We aren't talking about the heat of passion. We're talking about murder, knowingly or intentionally taking another human life. You're telling me that you would give twenty years and could not give five years; is that correct?

A Right.

Q I'm not misstating that, am I?

A No. Like it's cold-blooded murder, I would say at least twenty years.

Q Obviously you feel like human life is valuable and human life is precious?

A Yes.

Q That's the minimum value you would put on a human life; is that fair?

[2200] A That seems fair enough because the way I feel like, anyone take another person's life and it's not self-defense and it's just cold-blooded murder, then that person should at least be removed from society and at least take away twenty years of their life by taking them out of society.

Q Okay. Twenty whole years?

A Yes.

Q You made the comment earlier, no parole, but twenty years?

A Right.

Q Twenty calendar years—

MR. WEST: Your Honor, I'm going to object at this time. The Court has called time and Mr. Nelson is continuing to ask questions.

THE COURT: Well, I've given both sides a little leeway.

Mr. Nelson, your time is to a close, so bring it to a close.

Q Mr. Kennedy, my time is over and I appreciate the Judge being generous with me and letting me talk to you for just a couple more **[2201]** minutes, but I feel—I've tried to explain this as best I can. Do you feel like you understand what we've been talking about here?

A Yes.

Q I take it from what you've said, this is something you feel strongly about, is that right, and I could sit here and argue with you and argue with you and I'm not going to change your mind; is that—

A That's right.

Q I don't want to do that.

A I didn't think that you were trying to.

Q I'm just trying to find out how you feel and I don't think any of us here has a right to argue with you about how you feel. None of us is doing that and none of us is going to do that. I wanted to be sure that we're clear and you've told me that you feel like we're clear and understand what we've been talking about. I appreciate very much your time and I appreciate your patience with me in talking with me and being forthright and honest in your answers. I believe we wouldn't change your mind and I don't have any reason to think **[2202]** that you will. I'm not going to bother you any more. Mr. Kennedy, I thank you very much for your patience with me.

MR. NELSON: Your Honor, I'll pass the potential juror.

[2203] EXAMINATION

BY MR. WEST:

Q Mr. Kennedy, as Mr. Nelson said, my name is Royce West. I need to talk with you a little bit to make sure that you really understand what's going on.

Now, how many times have you been called down to serve on a jury?

A This is my second time.

Q You didn't serve the first time?

A No. The first time, when I came down, we were called up like we were yesterday, but the trial settled out of court, so they told us at that time, as far as they were concerned, we had served.

Q And you went on back home?

A Right.

Q Now, let me explain something to you. Mr. Nelson told you at the beginning that you're the forty-third person that we have talked to. Now, in a capital murder case each side has fifteen strikes that they can use for any purpose that they want to. When I say strike, I'm not talking about

physical strikes. They can say, no, I don't want this person. **[2204]** They can do that fifteen times. Now, they can say I don't want this person and they don't even have to give a reason, if they don't like the way they part their hair, if they don't like the color shirt they have on, the color of their suit.

Now, both the State and the defense have that option. Some of those strikes have, in fact, been used in this particular case. In fact, the State has used eight and the defense has used six, so that's fourteen strikes that have been used for some purpose or another. Do you understand what I'm saying?

A Uh-huh.

Q Okay. Now, the only issue that we really need to address—and no one is asking you to make a decision until you hear the facts of the case. The law requires that, in order for you to be qualified to sit on this jury, you have an open mind. From listening to your responses, I believe that's what you're saying, that you would have an open mind; is that correct?

A Yes.

[2205] Q Now, sir, would it be a fair statement to say that, if you took the oath—and the oath being that you would a true verdict render based on the law and the evidence—would you do that?

A Yes. Well, the evidence and the law, but the evidence being the main thing.

Q The evidence being the main thing?

A Yeah.

Q But you've got to stay within the confines of the law, too?

A Well, yes.

Q The Judge says that it's a theft case, for example, that a person commits the offense of theft where he knowingly and intentionally takes someone else's property without their consent, in order to find that person guilty you would have to listen to the evidence and make a determination as to whether or not you believed the evidence and if you believed the evidence, you could follow that oath; is that correct?

A Yes.

Q If you didn't believe it, you could say that the person is not guilty?

[2206] A Right.

Q Okay. The same thing applies to punishment. Now, Mr. Nelson asked you initially what's the minimum that you could give a person for first degree murder, knowingly and intentionally taking someone's life without any legal justification or excuse. I believe that your response, sir, was twenty years?

A Yes.

Q At that time you did not know what the range of punishment was that the law provides, did you?

A No, I didn't.

Q Now, understand that the legislature, the people that we elect down in Austin, have set that range of punishment and that range of punishment has been in effect ever since I've been a lawyer and I've been a lawyer for some six years.

Now, obviously if the range of punishment is from five years to ninety-nine year or life, there is a reason that they did it and that's because there is a broad range of facts and circumstances that would necessitate a minimum of five years **[2207]** all the way up to life and an optional fine of $10,000.00. Would you agree with that?

A Yes.

Q Now, the law says that, if you hear evidence that you feel as though warrants the maximum of life, in order to be qualified as a juror, you have to tell the State that, if I hear those facts and circumstances and I feel as though it's proper in my heart, I feel as though it is proper, I can give that person the maximum of life. Can you do that?

A Yes.

Q The law also says that you have to be able to tell the defense that, if you hear the facts and circumstances and you feel as though it's proper in your heart, you would be able to consider and, under the proper facts and circumstances, give the minimum of five years. Can you do that?

A Now, saying that you're on the jury and there is twelve people on this jury, right?

Q Yes, sir.

A One person—and let me say it was myself—say that I said—say the case **[2208]** come out to where it could be the minimum. Say that I wanted twenty. My one against eleven—

Q Now, the minimum is five.

A I know that. That's what I'm saying, see. I'm saying twenty and they're saying five. My one against eleven, what would that mean?

Q In a situation such as that, the Court will tell you basically you are to intelligently and honestly deliberate and try to reach a verdict if it doesn't do you any harm.

A Every one has to agree on the same amount of time?

Q It has to be a unanimous verdict, yes. Now, again, the law only requires—we're not asking you to commit to giving anybody five years. The only thing we're asking you to do is to have an open mind, to listen to the facts and if you feel as though the facts are warranted, if you feel as though the facts warrant a minimum of five years, you be able to have an open mind and be able to give five years, if you feel as though it is warranted. Do you understand what I'm saying?

[2209] A I understand what you're saying.

Q Now, can you do that?

A It would greatly depend on the facts because here again you're coming back to the law. You know, you keep putting that against my personal opinion and the law. Now,

like you say, the law has a minimum of five. What I think, my personal feelings, but here again I'm only one.

Q It would depend upon the facts, right?

A Yeah.

Q If you felt as though the facts warranted five years, you would be able to give five years and if you felt as though it didn't warrant five years, you would be able to give twenty, thirty or all the way up to the maximum, but you would have to listen to the facts first?

A You would have to listen to the facts. But also, when you—like I say, here again, I always think about a jury is you have a number of people. You're not only taking one person's complete—you're looking at eleven other people all total?

[2210] Q That's correct.

A Like you-said, they've got to come to a unanimous decision and somewhere in there, it's going to be some concession.

Q Exactly.

A There's got to be some concession between the members of the jury.

Q Okay. See, each juror that is selected in this case or any case, whether it be down in municipal court where the maximum is a $200.00 fine, in order to be qualified you must say—and not only say, but you must be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum all the way up to the maximum. Nobody is asking you to commit to anything. I'm not saying, hey, if you were on the jury, give my client the minimum. I'm saying be objective and keep an open mind and be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum if you believe that the facts warrant that particular penalty. Each juror that serves would have to be able to do that. Again, no one is trying to pin you down. We just want to **[2211]** make sure that you're qualified for the whole range of punishment.

Now, you said this was your second time down here. There is an infinite number of examples or situations. That's why the range of punishment is so broad. The legislature has set this range of punishment and obviously when they set this range of punishment, they took into consideration the myriad of circumstances and that's why the range is so broad. Do you understand what I'm saying?

A Just to get this clear, it's a minimum of five years for, like he was speaking earlier, murder, just straight out murder?

Q Straight out murder, yeah, and a maximum of life, ninety-nine years or life and an optional fine of $10,000.00. No one says that you have to give the maximum and no one says that you have to give the minimum. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum or the maximum or anything within that range if you think that is the proper thing to do. You make the determination as to whether or not you think **[2212]** it's proper based on the evidence that you hear.

A The evidence is the main thing.

Q Can you do that, sir?

A Well—

Q Keep an open mind, that's all we're asking you to do.

REPORTER: What was your answer?

MR. KENNEDY: I didn't. I just said well.

A Like I say, it would take probably a lot of thinking on my part because for—to me, that's a broad range, five years to ninety nine-years. It seems like to me five years is a small amount to put on a person's life. It seems like the value of a human life is more than that. To say that I might take a person's life and I might only go to jail for five years and a $10,000.00 fine. That would be the minimum that you would be looking at.

MR. NELSON: Excuse me, Judge, and excuse me, Mr. Kennedy. You made a comment that the minimum was five years and a **[2213]** $10,000.00 fine. I think it needs to be clear that the fine does not have to be assessed. The minimum is five years with no fine whatsoever.

Q But also, the fine can be assessed, too, though. You don't have to, but you can.

MR. NELSON: But that wouldn't be the minimum. If a fine was assessed, it would no longer be the minimum.

THE COURT: You understand that, don't you, Mr. Kennedy?

MR. KENNEDY: Yes.

THE COURT: That fine is at the discretion of the jury, but is part of the potential punishment.

Q Okay. Now, are you trying to think up some. facts that would warrant a five year sentence at this time?

A Normally in your mind you would think about it because when you say that the minimum is five years, you would try to think **[2214]** of what situation would come up where a person would only get five years.

Q Now, realize, Mr. Kennedy, that this is your first time down here. Now, you probably have fifty years of trial lawyer experience sitting before you and that's not even including the Judge's experience. The legislature set that range of punishment, from five to life. You don't have to sit there and think of a situation. The only thing that we're asking you to do is to have an open mind to the evidence in the case, just have an open mind to the evidence, and if the evidence establishes in your mind that the proper facts and circumstances have, in fact, been presented and you feel in your heart that the case should be a five year-case, that the sentence should be five years, then be able to assess that, consider it and be able to assess it based on the evidence.

MR. MACALUSO: Excuse me, Your Honor. I'm going to have to interrupt, Mr. Kennedy, and I apologize for that, but I have to object that we're kind of getting **[2215]** a little bit far afield. The prospective juror should be reminded that

we're still talking about a murder case. We haven't heard the word murder in quite a while. It's a murder case where one person knowingly or intentionally—

MR. WEST: Your Honor, I would ask that counsel make a legal objection.

MR. MACALUSO: He can't answer the question—

THE COURT: Ask your question again, Mr. West.

Q Mr. Kennedy, do you understand that we're talking about murder?

A Yes.

Q Okay. That's what we've been talking about for the last five minutes, right?

A The last hour, in fact.

Q If for some reason I go to another subject, I will make sure that you know we're going to another subject, otherwise we're talking about murder, okay?

[2216] MR. MACALUSO: I wasn't suggesting that you went to another subject, Mr. West.

Q Mr. Kennedy, again, the only thing we're asking you to do is to keep an open mind and if you feel as though the facts warrant a sentence of five years, you be able to assess it. If you feel as though it warrants life, you be able to assess it. Just keep an open mind, that's all we're asking you to do.

A I feel that I'm pretty much an open-minded person, but it would depend on the facts.

Q That's what I'm saying. It depends upon the facts. That's the whole point. It depends upon the facts that are presented to you. If you feel as though it a calls for five years, whether you can think of a situation right now or not—

A You know, as I have spoken earlier, even if I said that it would come up on a minimum of twenty, which eleven other people on a jury—and you know, any one—like I said, you-all being out there, you-all know this, even if one person did decide, one **[2217]** person is not going to be the one to

decide the whole verdict. It's got to be a consensus of twelve people.

Q But those twelve people all must be able, in order to be qualified to serve on a jury, to consider the full range of punishment and that's what I'm asking you, to be able to consider and, under the proper facts and circumstances, be able to assess five years and all the way up to life. Like you said, it depends upon the facts.

A Yes, it does.

Q Would you be able to consider the full range of punishment and be able to assess it depending upon the facts that you hear?

A I would say I don't know because it would have to depend on the facts.

Q That's what I'm saying, it depends upon the facts. I'm not saying—again, I'm not trying to commit you to—

A As I said earlier, my personal opinion would be I would say a minimum of twenty. If I was going to be one of the lawmakers or something, I would say a minimum of twenty.

[2218] Q I understand that and you have a right to feel that way, but what I'm saying is, the full range of punishment—in order to be qualified to sit on the jury, you must be able to follow the law and the law is saying that the full range of punishment for murder is from five years to life. I'm not asking you to commit to five years. I'm asking you to have an open mind to five years to life. If you hear facts that warrant the minimum of five years, would you be able to assess it under the facts and circumstances as you view them?

A Yes, I believe I could.

Q Okay. Now, you're saying that you believe that you could. Because of the nature of this particular case—and the law requires me to make sure that you understand—we can't have believes. We have to have a position on it, yes or no. Yes, I will be able, to consider the full range of punishment instead of I believe I could. Again, you haven't heard

the facts. You need to have an open mind to the facts. That's all we're saying.

A That's what I'm saying will determine the whole case, the facts.

[2219] Q Exactly.

A Because like I say, you aren't guilty until proven guilty.

Q You may never hear a five year case sitting on this jury or any jury, but the law just requires that, if you did hear a case where you believed five years was the appropriate punishment, you would be able to assess that five years. Can you do that? You said I believe I could.

A Here again, I say it would be—I would have to hear the circumstances. It's hard to say whether I could be open-minded or not. It would just have to depend upon the circumstances. I think I'm a reasonable person, you know. Anybody that is a reasonable person, like dealing with your own kids and stuff, you know you would have to be able see the facts and then you would deal with the situation. I've been a school teacher, so I know with kids, when you're dishing out punishment, you have to deal with the facts. Now, what your beliefs are up front and once you deal with the facts, then you might make a different decision because all cases are not **[2220]** the same and that's why you've got this broad range. It also depends on the circumstances and that's why I keep going back to that because it's hard to say that you would do a certain thing in any given situation because most people are going to do things differently.

Q See, again, I don't know whether you're misreading me or not, but I'm not trying to get you to commit to anybody's ideas.

A I know what you're saying. You're saying being open-minded to it. I don't know what circumstances. I'm not that familiar with the law as to what circumstances would warrant five years and which would warrant life.

Q And nobody is trying to get you to say what circumstances. There is no way in the world that you could

imagine all the circumstances sitting up there on the witness stand and the law won't let you. The only thing that the law is asking you to do is to—you may not ever hear a case where you would give the minimum of five years. The law only requires that if you do hear that case, if you do, within the next ninety-nine years, a hundred years or so, if you heard that **[2221]** particular case, would you be able to assess the minimum of five years, if you heard it and believed that it was the thing to do? You see, don't try to think of circumstances. I'm saying if you heard a case where you believed that it was the thing to do, would you be able to do it? It would have to be based on the evidence.

A Yeah, I believe I could be openminded.

Q Again, you're saying I believe. Are you saying that you could be open-minded and that you would be open-minded?

A Yes.

Q So your answer to the question is that you would be open-minded to the full range of punishment?

A Yes.

Q Now, obviously there's a conflict concerning you being able to—your response to Mr. Nelson's question and the response to my question. You -told him at one point that there was no way in the world that you could consider anything less than twenty years?

A Right.

[2222] Q Now, by me having explained to you, do you understand what the law requires of you?

A Uh-huh.

Q You've got to—

A Yes.

Q Now, what do you understand your role to be as a juror when attempting to make a determination as to what the appropriate punishment is going to be?

A The way I interpret it at this point—well, probably at any point—would be like the evidence and the way that I

feel is also going to be in with eleven other people and the way they feel.

Q What is your understanding about the minimum punishment now?

A I understand that the minimum is five years for murder and the maximum is the death sentence.

Q No. It's life.

A But we're speaking of capital murder, right?

Q We're talking about murder. We're still talking about a murder. Now, you're **[2223]** telling the Court and you're telling the defense and the State that you will keep an open mind as to the full range of punishment and if you hear facts and circumstances that you believe in your heart warrants a five year sentence and if you hear evidence from that witness stand that you believe would warrant a five year sentence, you could consider and also assess it; is that right?

A Yes—well, based on my opinions, it would have to be some strong evidence.

Q I don't have any problem with that. I'm just saying have an open mind to it. If it has to be strong evidence, then fine. That's up to you. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess it. If you're saying there has to be strong evidence, then fine, it has to be strong evidence. You're saying that you can consider and assess it if you felt as though five years was the proper punishment?

A I would say if I felt that way.

Q Again, if you felt that way.

A If I felt that way.

[2224] Q What does that mean?

A That means the evidence would have to be strong enough to make me feel that way.

Q All right.

A It would have to be very strong because, as I said earlier, I have feelings in one direction. The evidence would

have to be very strong. Very, very strong in order to make me change that feeling.

Q Right. That's all we're asking. So you're saying that you will have an open mind and if you believed that the evidence warranted it, a sentence of five years and you believe—

A You will have to really prove it.

Q Any defense attorney would have to convince you that five years was the appropriate thing to do, right?

A Uh-huh.

Q And you believed that evidence, then you would be able to give five years, right, but you would have to believe it?

A I would definitely have to believe it.

[2225] MR. NELSON: Excuse me, Mr. West and Mr. Kennedy. I'm sorry to interrupt again, but, Judge, Mr. West made a comment that the defense had to prove it, but the defense has absolutely no burden to bring any evidence whatsoever of any type at any time.

MR. WEST: I'll withdraw that, Your Honor.

MR. NELSON: Mr. Kennedy could be called upon to make that decision without the defense—

MR. WEST: I'm withdrawing the question.

Q Mr. Kennedy, if you believed—again, in order to be able to assess the minimum, you would have to believe that the evidence really called for it, right?

A Yes.

Q Okay. In order to assess the maximum, you would have to really believe that the evidence called for it; is that correct?

A Yes.

Q All right. Now, I see that you are a deacon at your church?

[2226] A Yes.

Q Who is your pastor there?

A Reverend C. H. Dorsey, Clarence Dorsey.

Q You work with the finance committee?

A Yes.

Q What position do you hold on the finance committee?

A Finance secretary.

Q How long have you been the finance secretary?

A About six years.

Q Are you a member of Prince Hall?

A I was a member of the Blue Lodge. Since I've been in Dallas, I have not been.

Q Is it a Prince Hall affiliation?

A Well, depending on the degree. I would have to check into it to see what degree it is.

Q What degree are you?

A Third degree.

Q You are a Master Mason, right?

A Yes.

Q I see you're a member of Phi Beta **[2227]** Sigma?

A Right.

Q That's a fraternity?

A Yes.

Q Now, have you ever heard of Omega Si Phi fraternity?

A Oh, yes.

Q If I was an Omega, that wouldn't make you bias or prejudice for or against me in any way, would it?

A No.

Q What do you like about the Cosby Show?

A It's putting a black family in what I would say is a good role on TV, just a standard role, you might say.

Q What type roles are blacks normally cast in in your—

A Well, they have been cast as the ones with a lot of—well, not portraying a true black family. I know Cosby might be, say, the upper end of one as two doctors in one house, but I like the show.

Q Do you listen to Tom Jones?

A Yes.

[2228] Q Do you ever listen to Willis Johnson?

A Sometimes.

Q Have you understood everything I've said so far?

A Yes.

Q Do you have any questions about what is going on?

A I think I understand what is going on.

Q What about that speeding ticket in that small town, did you understand what was going on?

A Oh, yeah.

MR. WEST: I'll pass him, Judge.

THE COURT: Mr. Kennedy, believe it or not, I'm going to be the last person that you talk to I want to make sure that I've understood your answers to Mr. West's questions and Mr. Nelson's questions. The reason I'm doing what I'm doing is, Mr. Nelson talked to you about thirty minutes **[2229]** ago and some of the things you told him—and then Mr. West asked you in the same area. There's been some time gap between them and, while I took careful notes, I want to make sure that you, Mr. Kennedy, and I are on the same wave length. What I'm going to talk about is this question about your feelings about being able, in a proper case, to assess a five year sentence.

As I recall, as Mr. Nelson summed up, you were asked to consider a situation where you as one of the jurors had found a defendant guilty of the offense of murder. No capital murder. Forget about that, just a murder case such as Mr. Nelson explained. The jury has found beyond a reasonable doubt that a defendant had knowingly or intentionally caused the death of another individual without any legal **[2230]** justification or excuse. Mr. Nelson explained that that

might be self-defense or it could be what we call voluntary manslaughter, that situation about involving your child in the sex abuse situation, or insanity. Those are defenses. If you, as one of the jurors, found that one of those things existed, you wouldn't find the Defendant guilty in the first place of murder. Do you understand? That's all out of the picture. You don't have that kind of situation.

You have the knowingly or intentionally causing the death of another individual by some manner or means, shooting, stabbing, choking. So you found the Defendant guilty of that.

Now, at this point in time, here's what the lawyers have been saying to you—and I think they were quite accurate in the way **[2231]** that they did it. They didn't mislead you or try to. The only reason I'm coming back at you is, there was gap of time. What both of them were saying is this: Both sides in this case, both the State and the Defendant, are entitled to twelve jurors over there in the jury box, if they have found a defendant guilty of the offense of murder, to have twelve people in the punishment phase of the case who can be of a frame of mind that, if they heard facts and circumstances in that case or whatever they might hear at the punishment phase, if anything, would in a proper case—that individual juror working together, as you said, with the eleven other jurors, would in a proper case be able to assess a punishment anywhere within the range of punishment that the law allows for a murder case which is five years **[2232]** in the penitentiary up to a ninety-nine year sentence or a life sentence and in addition to that, as Mr. Nelson pointed out, a fine of up to $10,000.00, if you wanted to. The question then comes down to, if you were a juror in a murder case and in a proper case, if the facts and circumstances warranted it in your mind and you thought it was proper, could you assess a five year sentence for the offense of murder, that is the knowing or intentional causing death of another individual?

MR. KENNEDY: There again, listening to what they have said and also making me think that you would also have to go along with the concept of the law.

THE COURT: What the law provides for, as Mr. West pointed out properly and I think Mr. Nelson did, too—the law doesn't **[2233]** require you to imagine the facts it would take you to give a five year sentence, but what the law is saying—and I'm not going to say it quite as delicately as they did—if you are a juror who says I don't care what the facts and circumstances I ever heard in a murder case are, I could not assess a five year sentence, that's one thing. If you're a juror who says I can't imagine facts and circumstances, but if I heard them, I could assess a five year sentence, that's still another thing. Where do you fit yourself in that picture?

Are you of the frame of mind that you could never hear a case where a five year sentence would .be appropriate in your mind for murder?

MR. KENNEDY: In those circumstances, I would have to put myself—as I've told them, I **[2234]** would put twenty years on someone's life. It seems like it would be valued at more than five, but if you have to weigh the circumstances and you look at it and you've got twelve people over there judging, your decision—you should be open-minded about it. You should be able to, with those twelve people, come to some sort of conclusion.

Now, mine may be twenty years, but I would like to judge it on the fact.

THE COURT: Well, if those facts—could there be a set of facts in your mind that would permit you to participate in a sentence of five years with your other fellow jurors?

MR. KENNEDY: I would put it this way. Are you just asking me if I could be open-minded or not because I wouldn't know how—what facts it would take to say **[2235]** this one is five years. When I think of something, I think of a murder, then I think of it as taking a person's life. I would say here is my value that I would put on a person's life. This is the way that I look at it. Now, you can present facts and I know, being on a Jury, you would have to sit there and be open-minded because you can't go in and say, okay, this person killed so hang him because you don't know all the cir-

cumstances and facts. That's what you're asking me to do, listen to the facts. They asked me opinion and I gave my opinion. If I can be open-minded—I think I can be open-minded enough, yes. My main thing is, you've got to listen to the facts.

THE COURT: If you heard a set of facts that told you five years was the proper punishment in a murder case, could you vote for **[2236]** it, a five year sentence if you heard that set of facts? Can you give me a yes or not to that? I hate to do like the lawyers did, but I've got to have a yes, I could or no, I couldn't.

MR. KENNEDY: Like I told him, there would have to be strong facts. Facts could change a person's opinion. I'm not saying a person's opinion could-not be changed, but I'm a pretty strong opinionated person. The facts would have to be—well, I know they would.

THE COURT: Did you say yes?

MR. KENNEDY: No. I haven't answered you yet. I was thinking about it.

THE COURT: Take your time. This is obviously an important question because we've spent a lot of time on it. I'm sorry that I have to bring you to the point of saying yes, you could or no, you **[2237]** couldn't, but. I do need to do that to determine your qualifications in this case.

MR. KENNEDY: I would say yes.

THE COURT: I hold that he is qualified, Mr. Nelson.

MR. WEST: Your Honor, I have a few more—

THE COURT: I'm sorry.

Q For record purposes, and I'm not asking you this to be funny or anything like that sir, okay?

A Okay.

Q You may say it's apparent in the courtroom as to what your race is, but it's not apparent on the record. This stenographer here is taking the record. Could you tell me what your race is, sir?

A Black.

MR. WEST: Nothing further.

THE COURT: What says the State, Mr. Nelson?

MR. NELSON: Your Honor, at this time the State will exercise **[2238]** a preemptory challenge.

THE COURT: Mr. Kennedy, you'll be excused from any service in this case and I want to thank you on behalf of the lawyers for your patience with us and your candid answers this afternoon. I believe you've told us exactly how you feel. You were asked some hard questions and gave some hard answers. Thank you, sir.

MR. WEST: Your Honor, before he gets off the stand, I want the record to reflect the nine strikes that the State has used, they've used six on blacks.

MR. MACALUSO: Thank you very much, Mr. West.

THE COURT: I won't comment on those number because I don't know. Let's take a very short break.

MR. NELSON: Your Honor, I want to put one other thing on the record before or after we take our **[2239]** break.

THE COURT: Do you want to do it after our break, Mr. Nelson? We'll do it when we come back.

(Whereupon, Mr. Kennedy left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead and do it now.

MR. NELSON: Your Honor, the State would like the record to reflect the following reasons for our exercising a preemptory challenge on Mr. Kennedy: He was hesitant about assessing the death penalty in this type of case, that being a murder during the course of a robbery. As matter of fact, his comment was that he felt the death penalty was probably only appropriate for a mass murder situation. He further was hesitant in answering the questions yes in spite of his **[2240]** personal feelings which would be opposite. For example, if he thought the Defendant should receive a life sentence, he hesitated for a great deal of time in saying whether or not he could still answer the questions yes knowing it would result in the death sentence. Because of that,

the State exercised a preemptory challenge on this potential juror.

(Whereupon, a short break was taken, after which the following proceedings were held.)

THE COURT: Mr. Salsini, I don't believe you raised your hand yesterday in reference to the question about having any conflict, did you?

MR. SALSINI: No.

THE COURT: The only thing I want to say to you before I turn you over to the lawyers is, to do what you're doing now which **[2241]** appears to be just leaning back and relaxing and answer these questions like you feel and don't worry about telling the lawyers something you think they want to hear. Just tell them how you feel about things.

* * * *

[2304] MARIE H. MAZZA,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Marie, I'm Paul Macaluso and this is Jim Nelson. When the trial itself actually begins, ma'am, we will be joined by Norman Kinne. He's not here, of course, right now, but he's another assistant district attorney like you and I. He will actually be presenting the evidence to the jury once it begins, the trial itself begins.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning.

Q You may recall that they are the defense attorneys who have been appointed by the Court to represent the Defendant. He's **[2305]** charged with capital murder, as you know, and his name is Thomas Joe Miller-El. He's at your very far right and you may be able to see him if you lean forward.

The reason why I've reintroduced every one, Marie, is because I want to reacquaint you with the roles all of us play and let you hear our names and then I would just like to ask you if you know or recognize any of us other than from the introductions on Monday?

A I know Mr. Cunningham.

Q You do?

A Two years ago I reported to jury duty and I spent a week and Mr. Cunningham was the defense attorney at that time.

Q Do you remember the case, what kind of case it was? Was it a criminal case?

A Yes, it was.

Q It involved a child; is that correct?

A Correct. I'm trying to think of the name of the accused. I'm not sure of the order, but it was Charles Ray or Ray Charles Woodard or Goodard.

[2306] Q Was it an injury to a child, is that what it was?

A Yes, it was.

Q You were on the jury for about a week?

A One week.

Q Let me just ask you this and this is really the only reason I'm asking you this question. Was there anything that occurred during that trial, whether it involved Mr. Cunningham or not, for that matter, that you feel would interfere with your service on this case at all?

A I don't feel that there would be anything.

Q Do you think he's the greatest lawyer of all times or the worse lawyer or he pleased you or offended you, I gather that wouldn't affect your service on this jury, right?

A I don't feel that it would affect anything.

Q As you well know, of course -- do you want me to call you Marie?

A That's fine, yes. I'm more **[2307]** relaxed with that.

Q That would be fine. That's the idea of all of this. You remember when you came down on that last jury, they talked to you in the presence of everybody else. When we talk about the death penalty and things like that, it can be a little bit inhibiting, I think. I've never been up there, but I can imagine it would not relax you too much to have forty or fifty people out there critiqueing every thing you say and quibbling over your position or whatever, so the law gives us the opportunity, in a capital case, to talk to you individually. Number one, the idea is to get you to relax, speak your mind, ask whatever questions you have and basically just tell us how you feel about some of these matters.

You know, as well as I do, that no one is going to quarrel with you or argue with you or try and change your mind even if we could, but if you have a question, then you ask it, all right? If there is something that you want to tell us, just go right ahead. You're not going to hurt anybody's feelings. If at any time we're not making ourselves clear, let **[2308]** us know and we'll repeat it, rephrase it, slow down or whatever it is. We kind of get running pretty fast at times.

As you well know, you are a prospective juror on this case and we're trying to find twelve -- well, we have three now, maybe only two. One has an illness problem or a health problem and we're a long way from that. We're trying to find the twelve people we feel would be the most fair, both sides would agree would be the most fair and qualified and suited to serve on this kind of a case.

Let me just tell you what our position is so you will understand where we stand at the outset. Just in fairness to you as we've told the other prospective jurors that we've talked to, Marie, we're actively seeking the death penalty in this case for Thomas Joe Miller-El. We're not making any apologies for it. We know that the law allows for it in these

types of cases and we intend to be able to provide this jury with the type and quality of evidence that we feel would convince them beyond any reasonable doubt whatsoever that **[2309]** Thomas Joe Miller-El is guilty of capital murder exactly as he has been charged. Then in the second part of the trial, once again, to provide the jury with the type and quality of evidence that would convince them that these questions -- two on this board and the third over there -- should be answered yes.

As you know, the result of three yes answers or all yes answers is a mandatory sentence of death. Basically that's what we're seeking based on the evidence that we intend to offer during the course of this trial. The only reason I tell you that, Marie, is to just let you know what our position is and what we intend and hope to be able to prove to this jury so that it wouldn't come as any surprise to anybody where we stand somewhere down the line. As you well know having been a juror before, it's up to the jury to decide those questions, you know, but we want you to know where we stand.

Now, you've been asked and given precious little time to respond the other day to these questions, the sixty or so different things there to consider. You were asked your **[2310]** feelings about the death penalty with a few minutes to reflect on it, of course. Now, you've had two or three days. Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

A The question has never ever entered my mind before the other day. You know, you hear about things, the different cases and such and people going to -- you know, as death being the result. I guess I have never ever realized that that could ever be asked of me, to make that determination. In those other cases, I feel the citizens, my fellow citizens, have had to make that decision. It's not an easy one and I feel that it depends upon the case, the testimony. They

have to go from everything to make that decision. The choice they made was unanimously that they felt strongly that this was the decision that they felt they needed to make. It's kind of hard determining somebody's life, **[2311]** whether they live or die, but I feel that is something that is accepted in our courts now and it is something that -- a decision that I think I could make one way or the other.

Q You more or less feel it is a responsibility just like the other type of jury service you were on? No one, would disagree with you if you feel that it would be a weighty decision because obviously it would be a very weighty decision, a very, very important decision. Knowing yourself as you do, Marie, do you feel, if called upon and presented the type of facts, that you could make that decision that would ultimately result in the execution of Mr. Miller-El under the law?

A It's difficult, I know -- and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult.

Q Let me ask you. You mentioned your religious feelings and other factors that you've thought about for the last couple of **[2312]** days. Is there some sort of conflict that you may have?

A Not really. I don't think anything said to me one way or the other in my religious beliefs or my family upbringing, no, somebody could not be sentenced. I think it is in dealings with the other people that know me is what I've kind of been a little bit concerned about, being on this type of a trial.

Q Could you tell me a little more about that? I'm not quite sure I understand you.

A There is not everybody else who is for capital punishment.

MR. WEST: I'm sorry. I didn't hear that.

A Not everyone is for capital punishment and my communication with these people, I feel like right now I'm in a very respected position and I don't want to lose any respect although I feel, you know, I am a citizen and these are my decisions. I don't want it reflected on anything else. That's kind of what I have been more concerned about, what other people think than what I feel.

[2313] Q Has somebody criticized you for --

A No. No. It's just me looking at the whole realm of every thing. I'm kind of -I try to look at all sides.

Q You understand, Marie, if you're selected for this jury, I anticipate the Judge will -- well, first off, the decision -- you know, the lawyers agree to accept you for this particular jury, we want to accept the Marie Mazza that we see here today on the basis of what you tell us and naturally, if you were to go back to your business or your home or whatever and someone either speaks pro or con for the death penalty, that really wouldn't be fair to either side, would it, because -- and I think the Judge would probably instruct you that you're not to discuss that with anybody from this point on. We want you as we decide you to be and see you here today. Can you do that, in other words, not allow other people to talk to you about this from this point on?

A Oh, sure.

Q You don't feel you would be subjected to any kind of influence subtle or otherwise, do you, that would influence your **[2314]** verdict in this case, do you?

A I don't think there would be anything that would influence me.

Q How does your husband feel about the death penalty, if you know?

A It does not bother him. If that would be it, that would be it.

Q He could probably serve on this type of a jury himself then, couldn't he?

A Yes.

Q I never did get around to it, but do you view the death penalty as having a particular purpose or serving a purpose in our society, you know, a reason for having it in the first place?

A I think there's a reason for having it.

Q How do you perceive that, Marie?

A I feel that there are certain crimes that are committed that there are no excuses and repeated crimes that just -- you know -

Q They've got to stop sometime?

A That's right. There was no mercy for the person that they killed and therefore, **[2315]** you know -- but there are circumstances and things like that and the evidence and there are accidental things and that type of thing.

Q Let's talk a little bit about capital murder. We're going to cover quite a little bit of ground here, Marie, in the short period of time that we have because the Judge does have us on some designated limits. If I go too fast, you slow me down, all right. We're going to cover some ground here.

A Okay.

Q You now the law allows the death penalty as a possible penalty in only one type of offense, one category of offense and that is the offense of capital murder. You remember from what the Judge said that capital murder is different from murder. Murder is not first degree, second degree or third degree. Murder, under Texas laws, is just called that, murder. That's where one person knowingly or intentionally kills another or causes the death of another. That's done without any legal excuse or legal justification. There may be seat-of-the-pants justification for A killing B, but without any legal excuse like self-**[2316]** defense, accident, insanity, a crime of passion. There may be a myriad of other reasons why -- that mitigate or aggravate an offense of murder, but you can't receive the death penalty for murder. That's got five years to ninety-nine years or life. It's a very broad range. It's just like the range that you had on the case that you sat on before.

Now, murder become capital murder for which you can receive either a mandatory sentence of death or life if you commit murder as I've described it, but then you add something to it. It aggravates it basically, if you commit a murder of a police officer or a fireman in the line of duty, a jail guard, a murder for hire. I hire Jim to kill somebody, we both would be eligible for it, me for doing the hiring and him for doing the killing or a mass murder. That's a category now. Or the type we have here, Marie. That's where you commit murder in conjunction with, murder plus, another very serious felony offense, murder plus rape, murder plus robbery as we've alleged here. You murder someone while you're robbing **[2317]** them for whatever reason or you commit murder while you're burglarizing a home or commit an arson or kidnapping somebody and you end up murdering somebody. Can you see how just logically it aggravates murder, something that is already really bad into something that is just even worse? Would you go along with that, that the type of crime, capital murder that is, the ones I've designated so far, are the types that you feel the death penalty ought to be warranted under certain circumstances, like murder during a robbery and depending upon the facts individually? Do you feel like that's the type of crime where you feel the death penalty ought to be warranted?

A Again, it depends upon the facts.

Q In other words, you would say -- I imagine you would probably say, I don't believe that the death penalty should ever be warranted for theft. Do you see what I'm getting at, but it may be warranted for murder during a robbery, is that correct, depending upon the facts?

A Correct.

Q For the murder of one individual, **[2318]** I gather you feel the life of one individual would be important enough to merit or warrant the death penalty depending upon the facts? In other words, it wouldn't have to be a mass murder, would it?

A No.

Q Okay. Now, the trial of a capital murder case is conducted in two phases. The first phase deals solely with -- it's like the other trial -- whether a person is guilty, if he's proven guilty, or if he's found not guilty. It's just that simple. You know your oath as a juror, if you take that oath, is to a true verdict render according to the law and according to the evidence. It's just like before. If the State proves the elements of the indictment beyond a reasonable doubt, you find the Defendant guilty. You have a requirement and a responsibility to do that. If we fail to prove that, you have a responsibility to find the Defendant not guilty. Any problem with that at all?

A No.

Q As you know, if the Defendant is found not guilty, that's the end of the trial. **[2319]** If you find the Defendant guilty, you go on to the second phase of the trial where you decide what the penalty is going to be. In a capital murder trial, of course, you may hear additional testimony and then again you may not. You may be called upon to answer those three questions -- you may only actually receive two. It depends on the evidence. You may be called upon to answer those questions based on what you know about the offense itself. On the other hand, you may hear additional testimony in the second part of the trial from either side or both sides, but there is no requirement.

At the end of that phase of the trial, you go back with the other jurors and decide whether or not the State had proven to you beyond a reasonable doubt that those questions should be answered yes. In which case, just as your duty was to answer yes or find someone guilty in the first part of the trial, your duty would be to answer those questions yes. If we fail to prove that, your duty is to answer the questions no. Any questions about that, Marie? It's just that **[2320]** simple. Three yes answers equals death and the Judge has to do that by law. He has no power whatsoever to override your verdict. When you write in yes, yes, yes, you really might as well, with that last yes, write in death because that's the effect of your answers. The same as, if you

write one or, more no answers to those questions, the same thing would be life. The Judge can't -- if he disagrees with you, it doesn't matter. His course is required by law and is dictated by the answers that you give. Any questions about that at all?

A No.

Q Now, the questions are there, Marie. Why don't you take a moment to read those and then we'll talk about them.

A (Juror complies.)

Q Do you have any questions at all about any of those particular questions? Do they cause you any confusion?

A The third one.

Q Okay. That's the one that usually does. We'll talk about that in a minute. Bear in mind now, hypothetically -- let's forget about Thomas Joe Miller-El for a second and **[2321]** let's forget about this particular case and let's imagine that you're on a jury and you've found somebody guilty of capital murder because we proved it to you beyond a reasonable doubt. You've heard some more testimony, and maybe not any more testimony, but you've heard all of the evidence, whatever it may be, and you're back in the jury room now and, you've got these three questions and you've got to decide now whether the State has proven to you beyond a reasonable doubt that those questions should be answered yes. If not, the answers to the questions is no. Any question about the first one or any problem with that? I think that is simply asking you to look towards the conduct of the Defendant and decide whether he acted deliberately and with the reasonable expectation that someone was going to die. Marie, do you see how you could probably learn whatever you need to know to answer that question yes or no when you learn about the offense itself in the first part of the trial?

A Yes.

Q Do you see what I'm getting at; what the Defendant did; what role he had; how **[2322]** the crime itself was committed and what role he had in it?

A I think I could answer that.

Q Yes or no depending upon the evidence?

A Yes.

Q Number two, what do you think is being asked there, Marie in that question number two?

A Would he continue to do this if allowed to be out -- you know, to be free again.

Q A key word may be -- you may agree that the key word in that question may be, or a key word, probability. What does the word probability mean to you within that context?

A Probability like possibility.

Q Okay. Let's substitute that word. Is there a possibility that the Defendant would commit criminal acts of violence? Now, you notice that they didn't specify -- the legislature did not specify a particular offense, did they?

A Huh-uh.

Q They didn't say is there a **[2323]** possibility he will do this again, another capital murder, commit murder again, or rape or robbery or burglary. It says criminal acts of violence. You may agree or disagree that that phrase may be self-defining, you know, an act of violence of a criminal nature. Would you agree with me in that regard? You don't have to, of course. What comes to your mind?

A What were you saying?

Q Well, that phrase may be self-defining. It doesn't specify a particular offense, does it?

A No, it doesn't. To me, any criminal act would mean anything. It wouldn't have to be the same. It would be violating -

Q An assault, a robbery, a rape?

A Right.

Q Okay. Let me ask you, Marie, if you could tell us, if you can, what would you tell us that you would like to know about a defendant that I think would really enable me to answer that question best? What would you like to know about a person or have to know, let's put it that way, or feel you should know about somebody that would enable you to best **[2324]** answer that question yes? What would be the most telling thing or things to your way of thinking?

A I guess, you know, if I knew the history of the man, their upbringing, I would feel that has a lot of bearing on it.

Q Let me ask you, Marie, allowing that, I think, almost any event -- and human experience comes in three phases; what happened before, what happened during or what happened after, whether it be -- well, anything, including capital murder. Allowing if you were to learn, for example, in a hypothetical case -- we're not talking about Mr. Miller-El -- what preceded a particular crime, a capital murder? For example, what preparation, if any, occurred? Was it a spur of the moment thing or was it something that was planned to some degree? What role did a defendant have in that planning, was it active or passive? Do you see what I'm getting at? The designation of the victim and the location and so forth and so on and what about during the crime, did he have an active role or a passive role, was he a bystander like driving the get-away car or was **[2325]** he over there, you know, in the thick of it? How vicious and violent was it? Did he have to do it? Did he have to kill somebody or was there an alternative that he could have taken just as well? Then afterwards, how did he react afterwards? Was he nonchalant and blasé about it, another day at the office or was it a situation where he was contrite and remorseful and showed some regret? Do you see what I'm getting at? You get a panorama basically of the offense and you learn all the dynamics coming and going. Let me ask you, Marie, do you think you could learn enough about an individual when you learn all of that, for example, where you would say, yeah, beyond a reasonable doubt I think this is the type of person who probably or possibly is going to commit some criminal

act of violence in the future given the opportunity?' Do you think you could learn enough about an individual?

A You're talking about just through the trial?

A Yes, ma'am, when you learn all the dynamics of a criminal episode.

A If the evidence was strong enough.

[2326] Q You may be able to hear more. Don't get me wrong, but in which case you would answer the question yes. If you don't receive that type of evidence or whatever pleases you or satisfies you beyond a reasonable doubt, you answer the question no.

The third question you may or may not receive. That is conditioned on whether there is any evidence to raise that question. You can boil that question down, I think, to basically this question: Was this a provoked killing or was it an unprovoked killing? Do you see what I'm getting at? If you decide it was an unprovoked killing, you answer the question yes. If, based on the evidence, you decide there was some provocation, that the victim did or said something that ended up provoking the killing, then you decide was the killing reasonable or unreasonable -- not an excuse under the law, but was it reasonable in light of human experience or unreasonable? Do you see what I'm getting at? Then you answer the question yes or no on that basis. Any problem at all?

A I don't think there would be any **[2327]** problem.

Q Let's shift gears here, Marie, because we don't have a lot of time left and I want to cover something with you that I talked about earlier. I'm not suggesting that this would occur, but it is something that I do have to cover with you. Imagine for a moment that you're on a hypothetical capital murder jury. The State has alleged a capital murder that's a murder during a burglary -- a murder during a rape. You, along with the other jurors, are convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you have a reasonable doubt as to whether or not it occurred during a rape, or there was any testimony

about a rape. You're just not convinced. You understand that you couldn't find that defendant guilty of capital murder because we didn't prove both parts, did we?

A No.

Q We just proved the murder by itself, so you would have to find him not guilty of capital murder and find him guilty of what we did prove, which was what, murder. If that were to happen, you just divorce any **[2328]** thinking about mandatory life or death because that is not even a possibility, as I said earlier, for murder.

Now, we all know obviously that any kind of murder is a serious offense, but the law allows you in this particular situation here you've convicted somebody of murder the broadest of all ranges of penalty for any offense under the laws of the State of Texas, and the lowest range all the way to the highest. I think the reason, everyone will agree, is that it allows you to tailor the facts -- you, as a juror, to tailor the punishment to the facts once you hear the facts. Remember the old cliche, tailor the punishment or make the punishment fit the crime? The law allows you to do that. Marie, I think we've all lived long enough to know that there is a myriad, an infinite number, of circumstances under which one person can commit murder, kill another person. All bad, but some are worse, right? Would you agree with me on that?

A Yes.

Q All the law expects for you to be **[2329]** a qualified juror on a murder case is this --and I think you are this type of person: Number one, you are the type of person who will follow the law, respect the law and will follow it; number two, you're an open-minded person because you've said a number of times you would have to hear the facts in the case, wouldn't you?

A Yes.

Q And you're not going to jump to any conclusions or anything like that, are you?

A No.

Q That's all the law expects of you to be a qualified juror, is say I've got an open mind because I'm an open-minded person and I will follow the law, whatever it is, whether I agree with it or disagree with it, and I will wait until I've heard all the evidence and then I'll make a decision. The facts that I hear, if I think they're proper and called for and warrant and justify a minimum sentence, I'll live the minimum. If the facts call for, warrant and justify, after I've heard them, the maximum, I'll give the maximum. Can you do that, Marie?

[2330] A I think I can.

Q Okay. No one is suggesting that the minimum would be an easy thing to do or the maximum would be an easy thing to do. I'd like to think that it would take pretty unusual facts to give either one of them, you know real severe or real mitigated. But when they're called for, you could do that, I gather?

A Yes.

Q You know the range of penalty for murder is not less than five years in the Texas Department of Corrections nor more than ninety-nine years or life and an optional $10,000.00 fine and anywhere in between. I gather from what you're saying, Marie, just as you could consider the full range of penalty in that last case you were on, you could consider, in a proper case -- and that's when you decide it's proper -- after you've heard the facts, if you felt it was proper and warranted it and justified it, you could return a verdict of five years for murder, I gather?

A Yes.

Q Even though you understand that murder is where one person knowingly and **[2331]** intentionally causes the death, under a wide variety of circumstances you understand, of another individual, but there is no technical nor no legal justification, so don't be thinking about self-defense or accident or anything like that, if you believe that someone knowingly and intentionally killed someone. You get to hear

all the circumstances surrounding that before you make a decision.

The same thing would hold true for the upper range. If you heard a case that called for, warranted and justified ninety-nine years or life and a $10,000.00 fine, could you do that as well, if you felt it was proper?

A Yes.

Q In other words, you would just wait and hear all the facts, wouldn't you?

A Correct.

Q One or two other things here and then I'll let the other lawyers talk to you, Marie. Remember that the Judge talked to you about the testimony of one eyewitness to any offense? The law requires that the State, having the burden of proof as we do -- there's no question about that. We have every thing to **[2332]** prove and the Defendant has nothing to prove. While that's true, the law allows us to prove a case in a variety of ways; eyewitness testimony, for example, as the Judge said the other day. It could be the eyewitness testimony of one individual because many crimes only have one eyewitness. That may be the only evidence. Do you understand that? In other words, if you believe -- if you're on a jury and you hear the testimony of one eyewitness, whether it be for rape, murder, robbery or whatever the case may be, and you believed that one eyewitness beyond a reasonable doubt, the Law says you can base your verdict, a guilty verdict, on that testimony. Can you do that, Marie?

A I think I can.

Q If you're convinced beyond a reasonable doubt?

A Uh-huh.

Q You understand that we don't have to prove motive or premeditation in any type of a murder case. The law does not require that in Texas. Any problem with that at all?

A No.

[2333] Q One last thing, Marie, you understand whether a defendant testifies or doesn't testify, it's his deci-

sion entirely. He has nothing to prove. We've brought the charges against Thomas Joe Miller-El and the only burden, as the Judge said the other day, he has is to be here. We've done the accusing and the law says we must do all of the proving. He has nothing to prove, Marie. We're not quarreling with that. Don't think that I'm muttering under my breath or anything like that. He has nothing to prove and furthermore, he has nothing to disprove. Part and parcel of that, Marie, is, if he chooses to testify, that's fine. You listen to his testimony and gauge his testimony as you would any other witness. If he doesn't, that is his prerogative just as it would be yours or mind and jurors, such as yourself, as you well know -- I'm sure you got this instruction before -- cannot consider the failure of the Defendant or a defendant to testify as any circumstance of his guilty whatsoever. You can't hold that against him, in other words. you didn't hold it against the last defendant, **[2334]** did you? I don't know whether he testified or not, but you wouldn't have?

A No.

Q All right. Now, do you have any questions of me at all, Marie, at this point?

A I can't think of any.

Q Marie, it boils down to this, do you know of any reason-why, if we proved to you beyond a reasonable doubt all that is contained in this indictment -- do you know of any reason, ma'am, if we proved it to you beyond a reasonable doubt, why you would not find the Defendant guilty?

A I think I could find him guilty.

Q In other words, if we prove it to you, you will find him guilty?

A Yes.

Q Do you know of any reason why, if we proved to you that those three questions should be answered yes beyond a reasonable doubt, knowing that it would result in his execution, you could not answer those questions yes?

A No.

Q By the same token, if we fail to **[2335]** do either of those things, you could find him not guilty or answer the questions no?

A Yes.

Q You will just follow the law and let the law take its course?

A Yes.

Q You've been real polite, Marie, and I appreciate it. I know we've talked a lot and thrown a lot at you in a short period of time and I know you've given a lot of consideration to it and we appreciate that. I know the other lawyers do, too. That's all the questions I have.

MR. MACALUSO: I'll pass the venireman.

[2336] EXAMINATION

BY MR. CUNNINGHAM:

Q Good morning again. Mr. West and I were talking a few minutes ago about the astronomical figure in two years—this is your second time ever on a jury?

A Right.

Q Seeing me again as a defense attorney. What do you think the odds would be of that happening, one in twenty million?

A I don't know. I feel a lot of times I'm either in the right place at the right time or the wrong place at the wrong time.

Q I don't think anything happened in the case where I represented—I think it was Charles Ray Woodard. Nothing happened in that case that would prevent you from being a fair and impartial juror on this case?

A No.

Q I guess my third and last question is, you remind us—I notice that your favorite TV show is Cheers. You remind—as we sat here, you look just like—what is it, the psychology waitress on Cheers?

[2337] A Diane?

Q Diane. Anybody ever tell you that you look like Diane?

A Yeah.

Q You really do.

MR. CUNNINGHAM: No further questions Your Honor.

THE COURT: What says the State?

MR. MACALUSO: We would be pleased to accept Ms. Mazza as a juror on this case, Your Honor.

MR. CUNNINGHAM: You said what?

MR. MACALUSO: We would be pleased to accept her as a juror on this case.

MR. CUNNINGHAM: Welcome aboard the gang.

THE COURT: Ms. Mazza, I'm going to give you the oath that I've talked about and then I'm going to give you some instructions as Mr. Macaluso hinted at. Let me ask you to **[2338]** raise your hand, if you would?

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: We moved through your voir dire rather quickly, although we never know when we start talking to a juror whether a juror is going to be accepted or say something to get excused or be challenged. The lawyers on both sides obviously believe that you would be a good juror to both sides in this case which means, as we expect in all cases, that you will call it right down the middle just like Mr. Macaluso talked to you about.

It is obviously a serious case for both sides. The reason I'm saying that is, is to say this to you: I'm going to give you some instructions now which are always given in every case, but they're particularly critical here because, at the rate we're **[2339]** selecting jurors, it's difficult to predict when we might start testimony. The best—and it has to be a guess because we just never know. Hopefully, we might start as early as March the 10th or the week of March the 10th. I'm going to hopefully start on Monday just because it's more—we're used to starting cases on Monday and it's a

little easier to get geared up over a weekend and it would give us more time to notify the jury. It could run into the following week very easily. It just depends on how quickly we move in the next couple of weeks. This is our third week of voir dire and you are the third sworn juror that we have that is going to serve. We had four sworn and have had to excuse one for medical reasons, so you can see how slowly it's going.

The reason that I'm telling **[2340]** you all of that is, is to remind you that it is going to be another two or three weeks before you will be called back. During that time, I instruct you most particularly not to let anyone give you any kind of input about this case, factual, philosophical, moral or otherwise because, as Mr. Macaluso emphasized to you and he was only emphasizing what the law is, it's very important to you and the other eleven jurors who end up being selected in this case to make your decisions about the guilt or innocence of the Defendant and, if you find him guilty, what punishment to assess based on the evidence from the witness stand up here and what you feel and believe about the case. I know you won't do it, but if you got some outside information or somebody talked to you about what sentence might or might not **[2341]** be appropriate, you can see where that wouldn't be fair to this Defendant or it would be fair to the lawyers and it wouldn't be fair to the State, of course, because they're entitled to a fair trial just like the Defendant.

I give you these instructions that I just gave you. What we will do is call you with as much lead time as possible before you will be called back. I hope it, at least, will be a day or certainly a day and hopefully, at least, a couple of days or a weekend. Have you saved my little slip from the other day?

MS. MAZZA: Yes.

THE COURT: Why don't you hang onto it in the event that you need to call us for anything. We're glad to have you and I think you, obviously, are a very good juror. We've gone through—you're forty-six and we've only **[2342]** got

three jurors, so you can see how selective this process is. We'll see you soon, I hope.

(Whereupon, Ms. Mazza left the courtroom and the following proceedings were held.)

* * * *

[3260] KEVIN C. DUKE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Duke. As I was introduced on Monday, my name is Jim Nelson. I want to reacquaint you with everybody else who is sitting here. This is Paul Macaluso sitting next to me. Another man who will be involved in this for the State is a man by the name of Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Mr. Duke?

MR. DUKE: Fine.

Q Next to him is Royce West.

MR. WEST: Mr. Duke, good morning.

[3261] Q These two gentlemen are attorneys in Dallas who have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-El, the man at the far end of the table in the light blue suit down there. As you know by this time, Mr. Miller-El is charged with the offense of capital murder. He's been indicted by the Dallas County Grand Jury for capital murder. That's the most serious offense that can be charged against any person in the State of Texas.

I was glancing through your questionnaire. I don't remember you being on any juries before; is that right?

A Right.

Q If you had been, we would have talked to you, in any other type of case, as a group kind of like you were seated Monday morning. We would talk to forty or fifty people at once and ask everyone some questions and go through it that way. In a capital case, the law allows us to talk to you individually. I guess because there are such strong feelings on both sides of some of the issues we need to talk about. The hope is that you will feel a [3262] little bit more comfortable talking to us individually than you would talking in front of forty or fifty other people.

I know if I'm in front of a group like that, I start worrying about what people think about what I have to say or how I'm saying it. We don't want you to worry about that. There are no right or wrong answers to anything I'm going to ask you or either of these gentlemen will ask you. We're just trying to find out how you feel about certain things.

Really all we ask of you, Mr. Duke, is that you relax as much as you can and be as open and honest with us as possible in talking about these things because what we're really trying to find out is how you feel. We've been at this for almost four weeks now and we have six jurors up to this point. We're halfway there, but you can see that it takes a while. The time we spend with you may seem a little tedious, but I hope you will bear with us and be patient with us because it is necessary so we will have the twelve people best suited to serve on this jury.

[3263] Let me just start out by telling you what our position is in this case. The three of us representing the State of Texas and the district attorney's office are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to a jury of twelve people the type and qualify [sic] of evidence to allow them to convict him of capital murder and the type and qualify [sic] of evidence to allow them to answer three questions yes. If those three questions are answered yes, Judge McDowell

has no choice but to assess the death penalty in this case. That's exactly what Judge McDowell will do in that case.

We anticipate, if those three questions are answered yes, at a time prescribed by law Thomas Joe Miller-El, sitting right down there, will be executed by lethal injection. Now, that's our position and we will maintain that position throughout the trial, but what I'm more interested in is your feelings.

You filled out a questionnaire on Monday. One of the questions on there was **[3264]** about the death penalty, how you feel about the death penalty. You've had a little more time to sleep on it and think about it now. I'd like to ask you to tell us just in your own words whether you're in favor of or against the death penalty and whether you feel like you could serve on this type of jury or not?

A I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's—if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to **[3265]** me.

Q You feel like the death sentence or the death penalty serves a purpose in our society, Mr. Duke?

A Yes, I sure do.

Q How would you put that purpose? How would you phrase that?

A It makes people think about it a little more than if you just—they don't treat it so lightly.

Q Do you know what I mean when I talk about deterrents, deterring someone from committing another crime?

A Right.

Q A lot of people come in here and have said that they felt it was a deterrent to crime. Like you say, other people that are thinking about doing this kind of thing, they're going to think twice about it.

A A lot of those people don't even think about it, though.

Q That may be. That may be. How long have you felt this way about the death penalty, Mr. Duke? Is this something you've just thought about recently or have you **[3266]** considered this for a while?

A I've considered it for a long time.

Q Have you ever felt differently about the death penalty?

A No. I've always believed in having the death penalty. I think it serves a purpose.

Q Okay. You're twenty-one; is that-right?

A Yes, sir.

Q Where are your parents?

A They're in Dallas.

Q Okay. Would you know how they feel about the death penalty?

A Yes.

Q How do they feel about it?

A That's where I get my feelings from, my father. That's the way my father feels about the death penalty. He doesn't like to see it happen. I mean, it's a sad thing to see, to have to kill someone, but they shouldn't have done the things that they did. Sometimes they deserve to be killed.

Q I think everyone would agree with **[3267]** you. We aren't going to have—we don't want twelve blood-thirsty jurors sitting over here on the jury.

A Right.

Q We want people that it's going to be a difficult decision to make.

A It's not an easy decision.

Q And it shouldn't be.

A It's someone's life here.

Q Let me talk to you a little bit more about the law generally in the State of Texas. What kinds of cases do you feel like the death penalty should be appropriate for?

A I think murder is the only thing, taking the life of another human being. I don't think anything else is worth—I mean, taking another life is the only thing that can be dealt with for another life.

Q The law in the State of Texas specifies one group of offenses where the death penalty is appropriate, offenses that are called capital murder.

A Murder in the process of another felony?

Q That's one. There are basically **[3268]** four different types of categories. One category is the killing of a certain group of persons like a police officer or a fireman on duty or a prison guard. The second type is murder for hire, if I hired somebody to kill somebody else. Both I and the person I hired could be prosecuted for capital murder. The third kind is mass murder like the incident at Ianni's a year or two ago. The fourth kind is the one you mentioned. We call it murder plus for lack of a better phrase. It's murder in the course of another offense like a burglary or an arson or a kidnapping or a rape.

What we've alleged in this case, Mr. Duke, is murder in the course of a robbery. Basically what our indictment says is that this Defendant did knowingly or intentionally cause the death of another individual. Now, that in and of itself is murder in the State of Texas. That's not a death penalty offense, just murder. We have to go further. The indictment further says that he caused that death while in the course of committing a robbery. We have to prove both of those things to you in order for him to be guilty of capital murder.

[3269] Now, the way that is basically done is, the trial is in two phases. After we get a jury selected, the first phase is what we call the guilt or innocence phase. It is during that period of time that we have to prove to you what is in this indictment. When I say "we", I'm talking about Mr. Kinne, Mr. Macaluso and myself. That's our job to prove it to you. As Thomas Joe Miller-El sits down there at that end of the counsel table, he's presumed to be innocent.

A Right.

Q If you were on a jury and right now had to go out and decide guilty or not guilty, you would have to say not guilty because we haven't proved it. Now, that doesn't mean that he didn't do it, but it means that we have to prove to you that he did it.

A Right.

Q There's an old saying down here, we did the accusing and we've got to do the proving and that's the way it works. We have to prove it to you beyond a reasonable doubt. If we do, it's your duty to find him guilty and, if we don't, it's your duty to find him **[3270]** not guilty.

Now, along with that presumption of innocence is the fact that he doesn't have to testify. As a matter of fact, nobody over at that table has to ever say a word.

A Right.

Q We may not hear a peep out of him through the whole trial, but if we don't prove our case to you beyond a reasonable doubt, you have to find him not guilty. They don't ever have to prove or disprove anything at any time.

Now, if the Defendant chooses not to testify, the jury cannot consider that in any way. The law doesn't even allow you to think about it because he has an absolute right—there could be fifty reasons why he didn't testify.

A Right.

Q Now, somebody might not be able to speak very well or all kinds of reasons why they wouldn't testify and you can't hold that against him and you can't consider it at

all in your deliberations. Do you have any problem with that?

A No.

[3271] Q Okay. If he does testify—and again, it's his option whether he wants to or not. If he does, we're going to ask you to listen to him and judge him as you would any other witness, judge his credibility like you could anybody else. We'll talk about that more in a little bit.

I told you the Grand Jury has indicted him for capital murder. This is a copy of that indictment. This indictment is absolutely no evidence of his guilt. We could put down in here—the Grand Jury can put anything in here that they want to put in. They can make it sound as horrible as you could ever dream, but it doesn't mean anything until we prove it in this courtroom beyond a reasonable doubt. That's what the guilt or innocence phase is about. That's when we have to prove—we have to prove, first of all, that this Defendant did knowingly or intentionally cause the death of another individual without any legal justification or legal excuse. In other words, it wasn't self-defense. It wasn't an accident and it wasn't anything like that. He just killed him.

[3272] Secondly, we have to prove that he that while in the course of committing or attempting to commit a robbery. If we prove that to you beyond a reasonable doubt, again it's your duty to find him guilty. If we fail to prove that beyond a reasonable doubt, it is your duty to find him not guilty. Do you think you would have any trouble with that?

A No, sir.

Q Okay. If he is found guilty of capital murder, the law says there are only two possible punishments, a life sentence—and that life sentence is the same as any other life sentence in Texas, subject to the same rules and regulations and procedures as any other life sentence—or the death penalty. Those are the only two choices.

Now, up until about thirteen years ago the way the jury did it is, they would listen to the evidence and they would go out and deliberate and decide life or death and they

would write on the jury form life or death and that's what it would be. The law was changed a little bit about twelve or thirteen years ago. Instead of the jury directly saying **[3273]** either life or death, the legislature said no, you have to answer questions based on the evidence and the answer to those questions will determine what happens.

If the three questions are answered yes, then Judge McDowell has absolutely no choice but to assess the death sentence. If he disagrees with what the jury did, that doesn't make any difference. If he has some questions about what the jury did, it doesn't make any difference. He must assess the death sentence.

By the same token, if one of those questions is answered no, he must assess that life sentence. Again, he has no options, no discretion. It's completely up to the jury. Can you see that even though you're not writing life or death, the effect is the same—

A Right.

Q —by answering those question? Now, the questions we're talking about are those three on the boards there. Why don't you take whatever time you need to read those over?

A (Juror complies.)

Q Have you had a chance to read them **[3274]** over?

A Yes.

Q Do you have any questions about them?

A Is the first one just basically saying that when he shot him, he knew he would be dead or he was trying to kill him not just injure him or shoot him in the kneecap or something like that?

Q I think probably that's looking towards the kind of thing, Mr. Duke, if I took a gun and pointed it at Mr. Macaluso's head and pulled the trigger, then it's pretty clear I expected him to die as a result of that. If I shot at his foot and the bullet bounced off the floor and the wall and the ceiling and came down and killed him, then there might be some

questions whether I reasonably expected him to die as a result of that or not.

A That's the way I understand it.

Q Okay. Now, those three questions are the same in every capital murder case. They're not special for this case. They're the same in every one. You, as a juror, if you're on this jury, may receive more evidence as the **[3275]** second phase of the trial or may not. We still have the burden of proof. We still have to prove to you beyond a reasonable doubt that those questions should be answered yes. If you have a reasonable doubt about any of them, it should be answered no. We may rely on the evidence from the guilt or innocence phase of the trial. We don't have to bring any more evidence, although we might. We don't have to although we keep the burden of proof. Again, they don't have to prove or disprove anything. They can, again, not utter a word and, if we don't prove to you those questions should be answered yes, then you should answer them no.

Now, we've talked about the first question. Let's look at the second question. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you feel like they're asking there?

A If you think he would go out and kill again, not just kill but be a threat to society.

Q Okay. Would you agree with me **[3276]** that a key word there is probability?

A Right.

Q What does probability mean to you, Mr. Duke?

A That there is a likely chance that it will happen again.

Q Okay. When we were talking about criminal acts of violence, you said murder and robbery. It could be a rape?

A Right, any threat to society.

Q Even if I did something like taking a baseball bat to somebody's head?

A Uh-huh.

Q Would you agree with me that that's a criminal act of violence?

A Yeah, I sure would.

Q Okay. Now, as I said, you may hear more evidence on that question and you may not at the punishment phase. You may be asked to answer that question based on what you've heard about the facts of this particular case. For example, I guess we can divide almost any event into three stages; the time before the event, the time during the event, and the time afterwards. You may hear about things like **[3277]** what happened before. Was this planned? Was the person on trial involved in the planning or was he a bystander? Had he planned it for a long period of time or did he show up at the last minute? How was he involved?

Second, during the event how did he act? Was he a leader or was he a follower? Was he out there as a look-out or was he out there giving orders and pushing people around? Could he have done something less than what he did that wouldn't have been as violent or wouldn't have been as dangerous or did he have to do what he did?

Third, after the event how did he react? Was he sorry? Did he show remorse? Did he feel bad about the fact someone had died or was it just another day at the office, just slapping a fly, nothing to it?

Can you see how looking at those things you might be able to answer question number two up there?

A Yes, sir.

Q Can you also see how question number two can be answered either yes or no depending on what the evidence is?

[3278] A Right.

Q Okay. Question number three is one you may or you may not get depending on the evidence. Let's look at it for just a minute. "Was the conduct of the Defendant in killing the deceased unreasonable in response to provocation, if

any, by the deceased?" Now, basically, would you agree with me, that is asking, number one, if this was a provoked killing or an unprovoked killing?

A Right.

Q If it was an unprovoked killing, that question would have to be answered yes?

A Right.

Q If it was a provoked killing, you're going to have to make a decision whether the Defendant's actions were reasonable or not in response to that provocation. Do you have any questions about any of those now that we've had a chance to talk about them?

A No, sir.

Q Now, what we're going to ask you to do, Mr. Duke, is keep an open mind and listen to all of the evidence before you make a decision on those questions. If the evidence **[3279]** proves to you beyond a reasonable doubt that those should be answered yes, answer them yes. If we don't prove that to you, if you have a reasonable doubt, then you answer them no. Can you keep an open mind and listen to all of the evidence before making that decision?

A Yes, sir.

Q If question number three is not submitted to you, then the sentence will depend on your answers to questions one and two. If both of them are answered yes, it's the death penalty. If one or the other or both of them are answered no, then it's a life sentence. Have I made myself clear about that?

A Yes, sir.

Q Now, there is something that may come up. We don't anticipate that it will, but it might so we need to talk about it for a couple of minutes. I told you that we call this type of capital murder plus. Let's look at a case—let's not use this one. Let's use a murder in the course of a burglary, for example, and you're sitting on the jury and we present evidence to you that shows you that the defendant killing a

person, knowingly or **[3280]** intentionally caused his death, but you don't hear anything about a burglary. Now, we haven't proved capital murder to you, have we?

A No.

Q We've proved murder. I think I told you earlier that has a different range of punishment in the State of Texas. The death penalty is no longer an issue. The range of punishment for the offense of murder in Texas is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. In order for you to be qualified to serve as a juror, you have to be able to consider the entire range of punishment for the offense of murder.

We use the phrase "able to consider". That's a legal phrase and let me see if I can explain that a little bit. You don't have to be able to sit there right now and tell us you will give somebody life or tell us you'll give somebody five years anymore than you can sit there and tell us you will give somebody the death penalty because you don't know the facts and we can't tell you the facts at this time. The law doesn't allow us to. **[3281]** When we say able to consider, basically what we mean is this: After you've heard all of the facts and circumstances you're going to hear, all of the evidence in the case, the facts about this offense, anything about the person on trial that you're ever going to know, after you've heard all of it, if you believe based on all of that that the proper sentence is ninety-nine years or life, could you give ninety-nine years or life for the offense of murder?

A You're saying you've proven that he's committed the murder?

Q Okay. Let me make that clear because I've kind of jumped over it a little bit. Murder in Texas is knowingly or intentionally killing another human being without any legal justification and without any legal excuse. In other words, if it's self-defense, then the person is not guilty. If it is an accident, the person is not guilty. If the person who did it is insane, they're not guilty. If it's a killing in the heat of passion, somebody raped my four year old little girl and I found out who did it and he was standing two houses down laugh-

ing and telling **[3282]** everybody about it, and I went down and killed him, that would be killing in the heat of passion. That's not murder, either. That's what is called voluntary manslaughter.

A Right.

Q So when we talk about murder, we're talking about knowingly or intentionally killing another human being. They decided to do it, knew they were going to do it and did it. Are you with me so far?

A Yes.

Q Now, would you agree with me that there can be hundreds and maybe thousands of different situations where one person could kill another person?

A Right.

Q I'm not even allowed to give you examples of what some of those situations might be, but there could be provocation from the person who got killed that wouldn't amount to self-defense, but might affect why the killing occurred, all kinds of—the prior relationship of the parties, you could hear about that, if they had trouble before, if they were fighting or something. You can hear all **[3283]** the surrounding facts and circumstances in a murder. In other words, you can know everything about the murder and you will probably get some information about the person who committed the murder.

If you found somebody guilty of the offense of murder, the law says that the range of punishment, which is the widest in the State of Texas, is anywhere from five years up to ninety-nine years or life. Now, I think, it's probably to take into account the hundreds or thousands of different fact situations where a murder could occur. We talked about it like knowingly or intentionally caused the death of another individual without any legal justification or without any legal excuse. Well, that's what murder is, but a lot of things can enter into that. It's still a murder, but a lot of circumstances can come into it, so what the law says is, after you have heard all of the facts and circumstances relating to that case

and to that defendant, then you have to make a decision on what the punishment should be.

Obviously since the legislature **[3284]** has set that wide range of punishment, we can't have jurors who have their minds closed completely to one end or the other. You don't even have to be able to sit there right now and think of a set of circumstances where you would give five years or where you would give ninety-nine years. What you have to be able to tell us is that you will listen to all the facts and all the evidence and keep an open mind and, after hearing all the facts and all the evidence, everything you're going to hear, if you believe that it's a proper case based on those facts and circumstances for a life sentence, would you give a life sentence?

A Yes, I would.

Q Let's go to the other end. Again, you've heard all the facts and all the circumstances, everything that enters into it. If you've heard everything and after hearing all that, you believe in your mind that this is a proper case that calls for a five year sentence, can you give a five year sentence?

A Yes, sir.

Q Okay. For the offense of murder, is there any problem with that?

[3285] A No.

Q Again, I want to emphasize that you don't have to be able to sit there right now and think of a set of circumstances where you would give five years. All you have to tell us is, if you hear that set of circumstances, whatever it may take—you may not be able to tell us what it would take, but if you hear it, you can say, well, this is that one case in a million that calls for five years and I'll give five years?

A I'd have to know what happened.

Q Right.

A If I could give from five to ninety-nine.

Q If you thought it deserved five years, you could give five years and, if you thought it deserved ninety-nine years, you could give ninety-nine?

A Yes, sir.

Q If you thought it deserved twenty-three point seven eight years, you could give twenty-three point seven eight years?

A Yes.

Q Or anything in between?

[3286] A Yes, sir.

Q Any problem with that at all?

A No.

Q Now, there's one other instruction that you may be given with reference to that. It basically says—and I've got a copy of it here in my hand. I'm not going to read the whole thing because it's kind of long. It says that a defendant may earn time off the sentence imposed through good conduct time. It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the aware of parole. It says it cannot accurately be predicted how the parole law and the good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment because the application of these laws depends on decisions made by the prison and parole authorities.

What that is saying is, good time exists and parole exists, but we don't know how it's going to be applied because that's up to the Board of Pardons and Paroles and up to the governor.

A Right.

[3287] Q Then it further says that you're not to consider the extent to which good conduct time may be awarded or forfeited by this particular defendant. You're not to consider the manner in which the parole law may be applied in this case. They're telling you it's there and they're telling you you can't consider it.

A Can't consider it.

Q I'm not quite sure why that's in there, but that's an instruction you may receive.

A So if we say five years and he gets off in a year, we can't consider that, if he has a chance for parole?

Q You can't adjust the time for that. Now, one further thing that statute says is, if it's a six year sentence or less, they have to serve a calendar two years. The bottom line is, all that's there, but you can't consider it. If you see a case that calls for five years, the law requires you to give five years. If you see a case that calls for twelve years, the law requires that you give twelve years and not adjust that one way or the other **[3288]** because of the parole law. Do you have any problems with that?

A No, sir.

Q I guess putting it into an example, say ten years and you wanted him to serve eight or twelve years if you wanted him to serve nine or whatever it is. You give him what you feel the case calls for.

A You consider how many years you're giving and not what could happen?

Q Right. Exactly. So you don't have any problem with that range of punishment at all; is that right?

A No, sir.

Q Just a couple more things real quickly. I think the Judge told you on Monday that the State does not have to prove motive for a murder and the State does not have to prove premeditation for a murder. Do you have any problem with that?

A No, sir.

Q You wouldn't require us to prove those. You may hear evidence about them.

A What has to be proven?

Q What has to be proven is what I **[3289]** told you is in the indictment, that he knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did so while in the course of a robbery.

That's what we have to prove to you. You may hear evidence on what the motive is or you may hear evidence that it was premeditated and you may want to take some of that into account in answering those questions, but we don't have to prove it to you for you to find him guilty of capital murder. Do you have any problem with that?

A No, sir.

Q I talked to you a little bit about credibility of witnesses. The law allows us to prove a case with the testimony of one eyewitness if you believe that eyewitness beyond a reasonable doubt as to everything in that indictment. Could you base a verdict on the testimony of one eyewitness?

A Yes, sir.

Q If you believed him—

A If I believed, right.

Q —you would render a guilty verdict and, if you don't believe him, then **[3290]** it's a not guilty verdict, or if you have a reasonable doubt. Any problem with that?

A No, sir.

Q On the credibility of witnesses, Mr. Duke, I guess it's kind of like a race. Everybody starts out at the same place and as they testify and you listen to them, some are going to go ahead and be more believable, some are going to fall back and not be so believable for one reason or another. You can't start somebody out ahead just because they're a priest or just because they're a minister or a doctor or something. You can't start somebody out behind just because they're a ditch digger or something like that. Everybody starts out at the same point.

A Right.

Q Then you listen to them and make your decision on their testimony as you're listening to them. You can't believe them just because of what they do for a living or just because of who they are. Do you have any problem with that?

A No, sir.

Q I've been talking to you for about **[3291]** thirty minutes now and I haven't given you a whole lot of time to talk, so let me just turn the tables for a second and ask you if you have any questions for me?

A I think I understand what you're asking. I don't really have any questions that I know of. I guess I can't ask you the questions I want to ask.

Q Well, we can't go into the facts of the case, if that's what you're wondering about. We can't tell you that now.

A How are you going to prove all of this?

Q We can't tell you that, either.

A The things I want to know, I can't ask.

Q Well, that's why you can't make a decision on guilty or not guilty or the sentence until you've heard the evidence.

A Right.

Q Because we have to prove it to you.

A Right.

Q That's what we're asking you to do, is keep an open mind and listen to **[3292]** everything before you make your decision. Do you have any problem with that at all?

A No, sir.

Q Mr. Duke, I'm out of time. I'm not going to bother you any more. I appreciate your patience with me and answering my questions as openly as you have. Thank you very much.

MR. NELSON: Your Honor, we'll pass the prospective juror.

EXAMINATION

[3293] BY MR. WEST:

Q Mr. Duke, as Mr. Nelson indicated my name is Royce West and, along with Mr. Cunningham, we represent Thomas Joe Miller-El who the State has charged with the offense of capital murder. He's the citizen accused of this particular offense. Now, let me say this before we start off with some questions and responses. I'm not prying into your

background. I'm not trying to be funny when I ask you these various questions. The only reason that I'll be asking you questions is because I need to find out as much about you as I can so we can intelligently decide whether or not you're qualified to serve on this jury. Fair enough?

A Yes, sir.

Q If you don't understand my question, just let me know. What high school did you graduate from?

A Nimitz High School in Irving.

Q Were you living in Irving at the time or what?

A Yes, sir.

[3294] Q You no longer live there?

A No, sir.

Q Do your parents still live there?

A They live in Dallas.

Q But that part of Dallas was in the Irving Independent School District or something?

A My parents are divorced. I lived with my mother when I was in high school. My father lives in Dallas now. My mother lives in Dallas, too, but they don't live together.

Q Okay. Do you live with one of your parents?

A No, sir. I live in an apartment with two other roommates.

Q What do your other roommates do?

A They both work at the same company I do.

Q That's with Summers Electric?

A Summers Electric is a wholesale electrical supply company.

Q You've worked for them for the past two years?

A Yes, sir.

Q How long have you been away from **[3295]** home?

A Four years.

Q Now, you indicated on your data sheet that you went to Texas A&M?

A Yes, sir.

Q You were there for two years?

A Yes, sir.

Q Was that on a scholarship or something?

A It was partial academic scholarship and my father paid for the rest.

Q Why did you leave Texas A&M?

A Well, Braniff went bankrupt and my father couldn't afford it any more.

Q I'm sorry?

A Braniff Airlines went bankrupt and my father worked for Braniff and we couldn't afford the school any more after that.

Q Why didn't you go to some other school?

A I was going to A&M and when Braniff went bankrupt, I didn't want to go anywhere else and besides that, I needed to go to work because my father couldn't afford to support me, actually.

[3296] Q Now, do you have any other brothers and sisters?

A I have one brother.

Q How old is he?

A He's twenty-three.

Q Did he go to A&M, also?

A No, sir.

Q What is he doing now?

A He lives in Denver, Colorado. He's a banker.

Q You indicated also as far as some of your hobbies or interests sports. What particular sport?

A I played football for twelve years.

Q At Nimitz?

A Yeah, since I was seven years old.

Q What position did you play?

A Middle linebacker and tight end.

Q While playing football in high school, did you receive any honors?

A Just like district, all district and all city and got awards in high school. Nothing major.

Q What years did you play for **[3297]** Nimitz?

A '78 to '82.

Q Did you have any scholarship offers?

A No, sir. I had a ruptured liver playing football, so that ruined my scholarships.

Q You also indicated skiing, watching sports, and being lazy.

A That's something I never get to do and that's what I like to do.

Q Do you hunt?

A Yes, sir.

Q What type of hunting do you do?

A Deer hunting and duck hunting. That's basically the two that I do.

Q What type of weapons do you normally use?

A It's a thirty ought six rifle and a shotgun.

Q Okay. How familiar are you with weapons?

A I just know how to use them. I'm not real familiar with all the different type of weaponry. I know how to hunt.

[3298] Q How long have you been hunting?

A Three or four years.

Q Have you ever seen—I guess, it would be a fair statement to say that you've seen an animal die before?

A Yes, sir.

Q Have you ever seen a human being die before, a human die?

A No, sir.

Q What is it that you liked about Rocky?

A A lot of enthusiasm for life, a lot of motivation.

Q Have you used that as a source of motivation in your life?

A Sometimes, yeah. I work out some and sometimes I listen to a Rocky tape just for a motivation to work out.

Q When you say "workout", are you talking about on weights or what?

A Lift weights and run or whatever.

Q How often do you do that?

A I used to do it all the time, but I had surgery on my thumb two months ago, so I've just started doing it this last week and I **[3299]** do it every day now.

Q Have you seen all four Rocky films?

A I've seen two of them. I haven't seen them all.

Q What about the Cosby Show. What do you like about that?

A It's funny. It's real fun. Cosby can make you laugh without cussing. He's the only comedian. I went and saw him in concert and Eddie Murphy and all them have to cuss all the time and Cosby never says one cuss word and he'll make you laugh harder than anybody.

Q You saw him the last time he was here in Dallas?

A Yes, sir.

Q Now, question forty-six, have you ever been interested in a criminal case in Dallas County and you said yes and it was the Jeter case. "The Jeter trial because they said he was guilty just because he was black." Would you care to elaborate on that?

A That was a big do with my grandfather. My grandfather is from Pennsylvania and he was down here during that **[3300]** time and my aunt lives out in Greenville, so they were all involved in the case and I got to hear about it every day. I don't read the newspaper that much because I basically don't have time to do it. I'm always working or doing something and I never have time to sit down and read or watch the news, so I get a lot of my information from my

parents in talking to them. My grandpa was all upset about that case and that's all we heard about for weeks, was him talking about the Jeter case.

Q What was he saying about it?

A He thought it was a bunch of rednecks out in Greenville. He's from Pennsylvania and he was saying it was a bunch of rednecks out in Greenville who decided to hang someone.

Q Decided to do what?

A Just to hang somebody, to pin the crime on Jeter because they couldn't find anyone else that did it. They couldn't find the person and they wanted to close the case and they just hung it on Jeter.

Q What did your aunt have to say about that, the one that lives in Greenville?

[3301] A I don't remember what she had to say.

Q Did she agree with him or what?

A I don't think she cared either way. She didn't really listen to it. My uncle agreed with him. He lives in Greenville, too, and he agreed with him. He thought it wasn't right. Everybody thought he was innocent and I guess from watching Sixty Minutes and all that, that I got the same opinion of it, too. He was framed for it.

Q Did you form any type of opinions concerning the criminal justice system and blacks?

A I think it's just one case. I don't think it's something that happens all the time. I think that was one case. I view it as one individual case.

Q Anything else you want to say about that?

A No.

Q Are there certain strong beliefs that you've had in your life, that no matter what anybody else says you believe in what you believe and that's it?

[3302] A. Yes.

Q Such as? Tell me some of these strong beliefs that you've had in your life that no one can change.

A I believe in God. No one can change that. I don't like gays. I'll be open and tell you that I don't. I could lie and say it doesn't matter, but I don't like them. If my son was gay, I wouldn't like it very much at all. I'm fixing to get married and I've been having to discuss that fact, what I would do if he was. I'm very strong about my family. If something happens to my family, it's very important to me no matter what.

Q Let me ask you this: What are your feelings about abortion?

A I believe it depends on the matter and the circumstances. I don't have an opinion one way or the other on abortion. I think in some instances, it's good and in some, it's not.

Q You just can't go through the whole litany of personal beliefs that you have, but there are certain things that you do believe strongly and as such, they're **[3303]** unalterable in your mind; is that correct?

A Yes, sir.

Q Let's kind of talk about—let me ask you this question: Do you know any of the participants in this trial? Do you know any of us personally or by reputation or anything?

A No, sir, I sure don't.

Q Now, let's talk about the death penalty. Your response to the question was that, yes, I do believe in the death penalty. It would be better to me than life in prison because that is dying every day. How strong are you on the death penalty? Is that a strong belief of yours?

A I believe it depends on the circumstances. It's not something to me that has to be done. I have mixed emotions about it because I feel that it really should be up to him whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty, you know. If I was up for murder, I would want to be the one to make that decision. I

know what I would do. I would rather die than be in prison for the rest of my life, being a useless human being.

[3304] Q But you could, if the facts called for it, assess it?

A If I could answer yes to all three of these questions, yes, I could.

Q Now, what offenses do you personally believe—and when we talk about personal beliefs henceforth, I'm talking about personal beliefs that are unalterable. What offense do you believe should be punishable by the death penalty, if any?

A Murder.

Q And you personally believe that and that's unalterable; is that correct?

A If anything. I wouldn't say that every murder should have the death penalty. I'm saying that taking another human being's life is the only thing that I would give the death penalty for.

Q Now, understanding that that's the only type of crime that you would give the death penalty for, how strong do you feel about that?

A Well, I can't say that—I'm not the kind of person to make a decision saying, if you murder someone, it should be the death **[3305]** penalty. I believe I would have to see the circumstances on each individual situation. I don't judge things as a whole. I judge things on their individual—what the circumstances are for a certain case. I'm not going to say no matter what someone did, they should be put to death. I can't say that and I can't say that I'm not going to say that he shouldn't be put to death no matter what he did. If I feel that I can answer all three of these questions yes and I feel that he's done a crime worthy of the death penalty, yes, I will give the death penalty.

Q If you feel as though the State has not proved that he is guilty, you can say not guilty?

A Right, definitely.

Q If the State does not prove each one of those questions beyond a reasonable doubt, you can say no?

A Yes.

Q And not be affected by how other people feel about it?

A No. It doesn't matter what anyone else feels about it.

[3306] Q Would it be a fair statement to say that you're an individual thinker?

A Definitely. I raised myself.

Q I'm sorry?

A I say, I feel like I've raised myself most of my life.

Q So you've had to make decisions in your life all along?

A My parents were divorced and my mother was not a very good mother. I'll put it that way. I've made most of my decisions in my life

Q Let's turn to these questions. You've already read the questions?

A Yes, sir.

Q I want to focus in on number two. The State has asked you what type of evidence you would need to answer that question yes?

A Excuse me?

Q I believe the State asked you what type of evidence you would need in order to answer that question yes? I believe that's what it was.

A What type of evidence I would need?

[3307] Q Yes. My question to you is, what type of evidence would you like to hear in order to answer it no, if any?

A I guess the only thing would be—well, it's hard to say what would make me say no. If he didn't really know what he was doing—but it wouldn't be murder if he wasn't

doing it intentionally, knowingly and intentionally like you said.

Q Right.

A I would have to say no.

Q Well, you wouldn't even get to that point.

A Yeah, I wouldn't get to that.

Q Let me ask you this: As Mr. Nelson has indicated, question number two deals with probability, being able to predict future behavior and make a determination as to whether or not a person is going to be a continuing threat to society.

A I feel, if he can commit a murder and not have any feelings about it at all, it doesn't bother him, like he said, swatting a fly, no big deal, then I think it doesn't matter. He's going to do it again.

[3308] Q So you believe as though, if you had convicted a person of capital murder, that would be sufficient for you in order to answer that question; is that what you're saying?

A Well, there would have to be evidence saying—that I would feel he would do this again or be a threat to society in some other way or form. I'm not saying just because I feel that he murdered someone and he was in the process of a robbery and he's guilty of capital murder that he would do it again.

Q You would have to have some evidence to show that?

A To show that he would do it again.

Q Now, if the law was such that it indicated that the State did not have to bring you any additional evidence, would you require them to bring you more evidence in order to answer that question? Let me back up. If all the evidence that you had was given to you in the guilt or innocence phase of the trial and the State didn't introduce any further evidence, would you require them to introduce further evidence in order to answer that question?

[3309] A Question two?

Q Yes, sir.

A If there wasn't any evidence about it, I would—probably, yes.

Q I'm sorry?

A Yes. If there wasn't any evidence showing that this wasn't just a one-time deal, that's all they could show, that this is just a one-time thing, it happened out of some other reason, you can't prove anything—that he would do it again or if he was that type of person or whatever, I would like to have more evidence to be able to make my decision.

Q Would you require more evidence?

A I'm not familiar with the law.

Q That's what I'm asking you. I'm just asking you, would you require more evidence in order to make a decision?

A In my mind, yes.

Q If the law indicated that the State didn't have to bring you any more evidence and that a jury could base its verdict or base its answer to question number two on the evidence that was presented during the guilt or innocence phase, would you be able to **[3310]** follow that law?

A I would have to. I would have to make my decision from that.

Q Would you just make it based on that evidence?

A If I don't have a choice and I have to make a decision.

Q The thing is, you have an option as to whether or not to take the oath in this particular case. The oath is that a true verdict render based on the law and the evidence. Now, as I think all the lawyers would tell you, a person is not expected to give up any kind of personal beliefs just to sit on the jury. They have an option, but the law does dictate that, if a person has a personal belief, they be able to set that personal belief aside and follow the law.

A Right.

Q Are you telling us that you would be able to set any type of personal belief aside and follow the law as given to you by the Court?

A Yes, sir.

Q Let me kind of go back around to **[3311]** where we kind of started from. The range of punishment for murder has been set by law. If you were governor for a day, what would you set the maximum for a case of murder at? Before you answer the question, how do you define murder? What do you think murder is?

A Taking the life of another human being.

Q Just taking the life of another human being?

A Well, murder to me is knowingly taking the life of another human being. If you know in your mind you're not insane, not you're not doing it out of the heat of a moment. Sometimes doing it out of the heat of the moment is murder, to me, too, because sometimes there is too many excuses for murder. Sometimes, to me, there are too many excuses for murder.

Q You're pretty close on the same definition as the law. Murder is knowingly or intentionally taking the life of someone else without any legal justification or legal excuse. If a person takes another person's life in the heat of the moment as you just **[3312]** indicated, it's not murder.

A That's one that would be hard for me to decide.

Q All right, but it's not murder. That's what the law says. If a person takes someone else's life after there has been some sort of provocation, it may very well be self-defense, okay?

A Right.

Q If a person knowingly and intentionally takes someone's life, but they're insane, then that's a legal excuse, insanity.

A Right.

Q The man that shot at the president, Hinckley, insanity.

A Right.

Q Thus the person wouldn't be guilty of murder.

A Right.

Q I'm talking about a situation where a person knew that he was going to do it. He intentionally did it and he did take the life of someone else. If you were governor for the day, what would you set the maximum penalty for that case?

[3313] A I'd say the death penalty is the maximum.

Q What would you set the minimum to be?

A For just murder by itself?

Q Right, just murder. He knew he was going to do it. He intentionally did it and he did it.

A I would say five years with no parole to that.

Q You would say five years with no parole?

A Yeah. If you murder someone, you need the time to think about it. If you're going to go back into society, I think you need time to adjust before you go back into society.

Q Let me ask you this: The minimum in the State of Texas is five years.

A With parole.

Q With parole. Now, the law is, if a person is sentenced to six years or less, they have to serve at least two years before they're eligible for parole.

A Right.

Q How do you feel about that law?

[3314] A I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it.

Q What about in a case of murder?

A I believe in forgiving. They can change. If they're the same human being and they're just going to go out and murder someone again, there's no way. If they go out and murder someone again, you know, that's not good for society to put them in jail for two years and then let them go and they do it again. If someone can change—someone can

change their mind about things and see what they've done and change their life and come out in two years and be a responsible human being, I believe in that. I would definitely like the parole board or whoever let's these people out to definitely know what they're talking about before they let them out.

Q You're telling both sides that you could consider the full range of punishment in this case; is that correct?

A Yes, sir.

Q And you could listen to the facts **[3315]** and circumstances in a murder case and, if you believed that the facts and circumstances called for it, you could consider and, in a proper case, assess the minimum of five years irrespective of the parole law?

A Yes, sir.

Q As the Court indicated and I think Mr. Nelson indicated, you would not consider the parole law in setting the punishment?

A No. I have to trust the parole board and hope that they know their business.

Q And likewise, you can consider and, under the proper facts and circumstances, assess life?

A Definitely.

Q One other thing I want to cover with you because I want to make sure that you understand this. The State has the burden of proof.

A Right.

Q The State has the burden of proof. Their burden of proof is beyond a reasonable doubt.

A Yes, sir.

Q If I were to ask you at this point **[3316]** in time to render a verdict in this particular case, what would your verdict be?

A He has to be innocent. I don't know this man from you.

Q That's exactly right.

A I don't know if he's on trial or you're on trial.

Q Or Mr. Nelson or Mr. Macaluso or anybody else?

A Anybody in this room could be on trial as far as I know.

Q Exactly, because the State has the burden of proof.

A Right.

Q Their burden of proof is beyond a reasonable doubt. You're going to have to judge the credibility of their testimony. Let me ask you this one question: Have you ever had a situation where you had to make a determination as to who was telling the truth and who was telling a lie?

A Yes, sir.

Q That's a common experience; is it not?

A Yes.

[3317] Q Have you ever had a situation where one person was saying that the other person did it and you had to make a determination as to who was telling the truth?

A Right.

Q A common everyday experience; is that correct?

A Yes.

Q If you're called upon to assess credibility in situations like that, can you do that?

A Yes, sir.

Q The State has the burden of proof and I want you to remember that.

A Yes, sir.

Q Do you have any questions of me at all?

A No, sir.

MR. WEST: I'll pass.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Just a moment, Your Honor. Your Honor, the State would be pleased to accept Mr. Duke as a juror on this case.

[3318] MR. CUNNINGHAM: Your Honor, may we have a few minutes?

THE COURT: You bet.

MR. WEST: The defense will accept the linebacker from Nimitz High School.

THE COURT: Let me ask you to raise your hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: Mr. Duke, let me just give you some additional instructions. You've been sworn as one of the jurors in this case and I think, as Mr. West told you, you're only number seven. We're making pretty good progress, but you are number seven and we're still five jurors away from having twelve. We hope to complete the jury selection this week and next week, if we're lucky, which means we'll probably start the case about March 10th. We may not start on that date. It may be in [3319] the middle or later that week or even the following week, but we would call you, as we will all the jurors, with enough lead time to get you down here, at least overnight and hopefully a couple of days.

During the time between now and then, I think it is really important that I remind you of instructions, and I'll give them to you again, about letting anyone discuss this case with you or discuss it with anyone. You made the statement on your own that you're an independent person and I believe that from listening to you talk for over an hour now. I think you would agree with me that it wouldn't be right and it wouldn't be fair to the State or this Defendant for anyone outside of the witness stand, where you will get your evidence, and the instructions that I give you, to [3320] give you any kind of input about this case. I don't believe that will happen, but I want to impress on you, if someone tries to talk to you about this, just tell them that you cannot and will not because the Judge has instructed you not to.

The final thing I want to leave you with is this: I'm not trying to make you—I just want you to know how important you are to this process. We've talked to—you're juror number seventy-eight and we've only got seven jurors including

yourself, so you can see—we haven't talked to that many, but we've gone through seventy-eight jurors. This is our fourth week and we have talked to many of those people just as carefully as we have you. The fact that you were accepted by both sides indicates to these lawyers that both sides believe [3321] you will do that. You've taken your oath and you will follow your oath. You've impressed me as being able and willing and capable of doing that and I don't think or have any doubt otherwise, so I just want you to go away knowing that when you come back down here, all both sides are going to do is ask you to take that oath and follow it. I think you will. Good luck to you. Thank you.

(Whereupon, this caused was recessed to 1:00 P.M., at which time the following proceedings were held.)

THE COURT: Mr. Macaluso, are you ready?

* * * *

[3837] TROY WOODS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Woods. Let me begin by reintroducing everybody here. I'm Paul Macaluso. This is Jim Nelson and we're the lawyers for the State. We work for the district attorney's office and we're representing the State of Texas and Dallas County in this case.

Next to Mr. Nelson is -Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Woods?

MR. WOODS: Fine. How are you?

Q And next to Mr. Cunningham is Mr. Royce West.

MR. WEST: Mr. Woods, good afternoon.

Q They're the defense attorneys. [3838] They're defending the man who is charged with capital murder. He is

the Defendant and his name is Thomas Joe Miller-El. He is at your very far right, Mr. Woods. You're tall enough. I think you may be able to see him from where you are. Do you see him down there? That's the Defendant and he is charged with capital murder which, as you know, is the most serious offense under the laws of this state. It's serious because of the type of offense it involves, capital murder, and it's also serious because it carries the two most serious types of penalties under the laws of this state. One is a sentence of death and the other is a possible sentence of life. These are things that the judge discussed with you the other day.

I'm trying to remember if you have been down here on jury duty before.

A No.

Q You have not served on a jury before?

A No, sir.

Q Ordinarily, Mr. Woods, if you came down here for any other type of case, you would **[3839]** be interviewed by the lawyers. The lawyers would talk to you, but we would ask you questions as you sat out there like you did on Monday with all the other people. We would ask you four or five or six questions and so forth and so on. The law allows us in this type of a case only to talk to you individually as we're doing now. It's kind of private here now, isn't it?

A Yes, it is.

Q It's a lot more private than it was yesterday. I think the idea behind that is, because the death penalty is involved in this case, so you can be as relaxed as you can possibly be without having a bunch of strangers around here to hear what you have to say. Do you see what I'm getting at?

A Sure.

Q Relax as much as you can, Mr. Woods, and I want you to bear in mind that nothing you tell us would be wrong or right. All we want to do is know how you feel. You don't have to say anything to please any one of us. That's not your responsibility. Your only responsibility is to tell us how Mr. Woods **[3840]** honestly feels about anything. If you do that,

you will be doing your job. I want you to know that no one is going to argue with you or quarrel with you or try and talk you into something or sell you a bill of goods. If you have a question about anything, you ask it. If there is something that you need to tell us, you just tell us what it is. Like I said, we're trying to find twelve people to act as jurors. We only have seven. We have either talked to or considered ninety-eight people and we only have, out of those ninety-eight, seven that are qualified to serve on this type of a case. Do you see what I'm getting at?

A Yes.

Q Because it's a very special type of a case when it involves the taking of another human life. Now, let me tell you what our position is, Mr. Woods, that is what the State of Texas, that is Mr. Nelson, myself and Norman Kinne, who was not introduced to you yesterday, but he's actually the lawyer who will be leading on this case once it begins. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What I **[3841]** mean by that is, we intend to offer evidence before this jury once the trial begins to prove that Thomas Joe Miller-El is guilty of capital murder just as he is charged in this indictment. In other words, he did the capital murder. In the second phase of the trial, we intend to offer evidence to convince a jury beyond a reasonable doubt that the questions that determine life or death should be answered yes which will automatically result in the Defendant being sentenced to be executed down at Huntsville, Texas. That's our desire based on the evidence. I make no bones about it, Mr. Woods. We know that the law allows for the death penalty in this type of a case depending upon the evidence and we're going to do our dead-level best to provide this jury as the law requires with the type of evidence that will result in this jury making a decision that would result in this man being taken down—well, first of all sentenced to death and then at some later date being taken down to Huntsville, Texas where the penitentiary is, placed on death row and then at a time designated by law, taken

over to the death **[3842]** house where he will be put on—do you know what a gurney bed is or what a gurney is?

A Sure.

Q Put on a gurney, taken to the death house where he's strapped down. They put a needle in his arm and inject him with enough of a drug, a lethal substance, to put him to death and eventually in a grave somewhere, someplace. Now, I don't mean to be gory about it, but this is not something—this is something we've told all the jurors just to be fair with them, Mr. Woods.

MR. WEST: Your Honor, that is a misstatement. All the jurors have not been told that.

THE COURT: I'll sustain that. Let me say, Mr. Woods, that we talked to some—I believe you're juror number ninety-eight and obviously every juror hasn't been told the same thing for one reason or another.

MR. WEST: Your Honor, could the juror be excused for one second for purposes of the record?

[3843] THE COURT: Sure. Mr. Woods, let me ask you to go out in the hall.

(Whereupon, Mr. Woods, left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead.

MR. WEST: For purposes of the record, I think the record should reflect that it is my recollection that not all of the jurors have been told that, but all of the black jurors have, in fact, been told that either by Mr. Nelson or Mr. Macaluso.

THE COURT: I won't comment on that because I haven't kept track of it.

MR. MACALUSO: Judge, I would renew the objection made that, if either side had a legal objection to make, to make a legal objection. I don't see that there is any legal objection.

[3844] THE COURT: I don't think it is, either.

MR. WEST: I just wanted the record to reflect that.

THE COURT: I'll sustain the objection. Let's go ahead. As regards to that, I know some jurors, the record will reflect, have been told that. Who they were or what their situation was, I don't know.

MR. NELSON: All the jurors have been told that we're actively seeking the death penalty, Judge. It's been put different ways, but they've all been told that, that we're seeking the death penalty.

MR. WEST: Judge, the only thing that I'm saying is, as far as the description of the taking him down to Huntsville from death row to the death house and being tied down to a gurney and then a needle put in their arm and then injected with a lethal substance **[3845]** until they are dead and he added put him in a grave this time.

MR. CUNNINGHAM: The statement was made that we have told every juror that and that's not true. Mr. Nelson didn't tell the last one and Mr. Macaluso didn't tell the one before.

THE COURT: Let's move on. We could argue about this for an hour. I don't think it makes any difference. I mean, it does, but what a juror understands is one thing. Go ahead.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

Q Mr. Woods, the reason I tell you that is to put you on notice. We have put all the jurors on notice what our position is with regards to this case, all the jurors that we've talked to.

It is only out of fairness to you and the other jurors that you know exactly what the stakes are in a case of this type. I'm **[3846]** sure when you came down here or I'm reasonably sure that when you came down here, you thought like most people did, you would end up on a burglary case or a theft case maybe, a DWI, or something like that. I don't imagine many people came down to the courthouse on Monday, who are on this panel here, thinking that they would be involved in a capital murder case where they might be called upon to

make a decision that would result in them actually—you know, one of the people out there on that jury panel making a decision that would result in another person, Thomas Joe Miller-El, being put to death, being executed.

You know that they're executing people in Texas these days. It's not a situation where you're just reading about it, as you read about that from time to time or you hear about it on the radio or on TV. But if you were actually on a jury of this type, you could be called upon to make decisions that would result- in you actually participating in that decision. Like I say, it's not something where you just kind of talk about it with friends or your family. It's not a situation **[3847]** where you read about it or hear about it. I guess what it boils down to is, you at this particular point are right in the middle of it. Do you see what I'm getting at?

A Sure.

Q The reason why we tell you this is to make sure that it's clear as we can just what would be involved in this type of a case if you're selected as a juror. As I said earlier, you know as well as I do that this is the type of case, when you talk about the death penalty and you talk about capital punishment, you talk about executing somebody, people have strong feelings one way or the other. Do you see what I'm getting at?

A Yes.

Q Now, what we want to know and what is most important in the final analysis, Mr. Woods, is how you feel about it?

A About capital punishment?

Q Right.

A About capital punishment, I think that punishment is too easy. I think that's a quick relief. I mean, you know, to give a person quick relief—what I call capital **[3848]** punishment is you give somebody hard labor for the rest of their life. I feel like that's more of a punishment than putting them to sleep.

Q Well, you just think that's too easy?

A Yeah.

Q In other words, you feel, when someone is executed, it's over.

A It's too quick. They don't feel the pain. That's the way I feel about it.

Q What do you think a person ought to receive for committing the worse types of crimes? What sort of punishment do you think they ought to receive?

A Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

Q Do you. have anything against the death penalty itself?

A No. I don't have anything against the death penalty.

Q Do you know of any reason, Mr. **[3849]** Woods, why you couldn't serve on this jury and answer questions and follow the law if it meant you making a decision that would mean this man ultimately down here would die? Could you make that decision?

A Sure, I could make the decision.

Q Do you think you could do it?

A Sure.

Q Even if it meant, as a result of your decision, that man—can you see him where he is?

A Sure.

Q Breathing the same air we're breathing here in the courtroom, he would be taken down to Huntsville and put to death?

A Sure, I could make that decision.

Q Do you know of any reason whatsoever why you couldn't do that?

A No, I don't know no reason at all.

Q Why do you think people ought to be executed in the first place?

A I think if people go out and take people's lives for no reason at all, I think everybody should be punished.

Q If I told you I was against the **[3850]** death penalty or against real serious punishment and you were for it, and obviously you are, isn't that right, what would you say to me to try and convince me that I should give the death penalty to somebody and why it is proper?

A Because we don't need people like that on the streets.

Q Have you ever felt differently about that?

A No. I've felt that way all my life.

Q All right. Let me ask you this: You said that you felt they should be staked out over an ant hill—

A That's not what I call being funny, but—

Q I agree with you. That would be some kind of punishment. That's not the law you understand?

A Yes, I know.

Q Let's just say it was the law. Do you think you could actually sentence someone to be staked out over an ant bed?

A Sure. I feel like if they survive **[3851]** for a length of time, that would be enough punishment and I feel like they wouldn't do it again.

Q On the other hand, I gather you're the type of individual who could follow the law; is that correct?

A That's correct.

Q Obviously the law does not allow for that kind of punishment and, if it meant making a decision that someone would be injected with a drug, even though it may be quick and painless, you could go along with that if the facts were there?

A Sure.

Q What kind of offenses do you think a person ought to be eligible to receive the death penalty for? What kinds of crimes do you think ought to warrant the death penalty?

A For murdering people and trying to rob somebody and take something that is not theirs. Anybody that would go out and try to take something that is not theirs, I feel like they ought to be put away.

Q Have you ever felt differently?

A No.

[3852] Q How about your folks, are they alive, Mr. Woods?

A Sure.

Q Do you know how they feel about the death penalty?

A No. I never discussed it with them.

Q You're a married man. How about Mrs. Woods, do you know how she feels about it?

A She's been on jury duty before, but I have never discussed that with her before.

Q If you had to hazard a guess, what would you say?

A I feel like she would go for it.

Q All right. Let's talk a little bit about the law in this type of a case and a trial of a criminal case generally. A person can only receive the death penalty, Mr. Woods, in Texas for the offense of capital murder. It doesn't matter whether he rapes somebody. It doesn't matter whether you rob somebody, commit theft, or anything. You have to commit a murder first and it must be a very special type of murder. The death penalty is only available **[3853]** as a punishment under very rigid circumstances for capital murder only. Am I making myself clear?

A Sure.

Q Capital murder involves a murder and murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or legal justification. Am I making myself clear?

A Sure.

Q Okay. By that I mean, when you think about murder, you don't think about self-defense. If I kill Mr. Nelson and you believe I did it in self-defense, that's not murder. That's a homicide, but it's not murder. You would have to find me not guilty.

A I understand.

Q Just like I would find you not guilty. The same thing if you kill accidentally. It's not murder. It's not guilty. Let's say you believe I was insane. When I killed Mr. Nelson, you believe I was insane. Not guilty. That's not murder. The same thing would be true if I came home and found out that someone that I love, like one of **[3854]** my children, had been sexually molested by my neighbor and he's up the street laughing about it, do you see, and I go into a rage and pick up a gun and run up the street and I kill him. Now, that's a homicide. It's bad, but it's not murder. That's a crime of passion and the law says that's voluntary manslaughter. It's not murder.

You must first commit murder. Even that type of murder, just regular murder, we'll call it, you can't receive the death penalty for that. If you commit murder and you murder a police officer or a fireman, a jail guard or you commit murder for money or you commit murder where you kill a bunch of people, then that becomes capital murder. It becomes more serious, you see, that type of murder. If you commit murder while you're committing a robbery, if you rob somebody and kill them, or raping them and you kill them, you commit burglary and kill somebody, arson or kidnapping, then murder under those circumstances becomes capital murder and you can receive the death penalty. Am I making myself clear?

[3855] A Sure.

Q How do you feel about that?

A I feel like calling a person insane, we're letting too many people get away with it, talking about insane. I feel like we ought to be able to given this to capital murder.

Q We'll talk about that in just a little bit. Let's forget about insanity for a little bit, all right?

A Okay.

Q How do those particular types of capital murder square with your way of thinking of what a person ought to receive—

A Fine.

Q Do you think a person ought to receive the death penalty for killing a police officer?

A Sure.

Q Do you think a person ought to receive the death penalty if he's robbing somebody, goes into somebody's business, for example, pulls out a gun and robs and kills them?

A Yes, even more so.

[3856] Q What would you give them for doing that? If you had your way about it, what would you do to somebody who went into a place of business, robbed somebody, and then executed them?

A I feel like they should get capital murder.

Q Would you have any problem returning the death penalty in a case like that?

A No.

Q You understand, before you could even consider the death penalty under the law, it would have to be for a type of capital murder?

A Yes.

Q Murder during a robbery—we've alleged in this case for Thomas Joe Miller-El, that man right down there, that he killed a man by the name of Douglas Walker while he, Thomas Miller-El, was robbing Douglas Walker. So we have the murder. We've accused him of murdering Douglas Walker while he was robbing Douglas Walker. I believe you said, if we proved that to you beyond a reasonable doubt, **[3857]** would you find him guilty?

A Sure.

Q If we don't prove it to you, you find him not guilty?

A Sure.

Q If we prove to you, in the second part of the trial—and you understand that the second part of the trial is where the issue of life or death is determined?

A Right.

Q You understand, in the first part is where you decide whether we've proved someone is guilty or not guilty?

A Yes.

Q You can do that? If we prove him guilty, you can find him guilty and, if we don't, you will find him not guilty?

A Right.

Q Now, in the second part of the trial, you're called upon to answer these questions. Did you get a chance to read those yesterday?

A I read these two here. I didn't see that.

Q It used to be under the old law **[3858]** just like in the movies. After a jury heard all the evidence in a murder case or a capital murder case, the jurors actually went back in the jury room and decided whether a person should receive the death penalty or a life sentence. If they all agreed he should get death, that's what the judge gave him. If all the jurors agreed he should get life, he got life. Do you think you could do that if you were called upon to do that?

A Sure.

Q Well, the law changed—that's kind of a trick question. The law changed about ten or twelve years ago and you don't do that directly. Instead, you answer questions. You don't decide whether somebody should live or die. You don't make that decision at all. You're not even asked to make that decision. All you do is, after you've heard all of the evidence, you decide whether or not we proved to you that these questions should be answered yes. If we do, you should answer them all yes. The effect or the result is, three yes answers is a sentence of death automatically. You don't have to write in

death. You just answer **[3859]** the questions yes and the Judge sentences the Defendant to be executed. Do you see what I'm getting at?

A Yes.

Q On the other hand, if you answer one or more of the questions no, do you know what happens then? The Judge automatically assesses a sentence of life for the Defendant. Do you see?

A Yes.

Q You don't decide life or death directly. You answer the questions and then the determination is made on the basis of the answers. Do you see what I'm getting at?

A Yes.

Q Could you do that?

A Sure.

Q Do you know of any reason why you couldn't do that?

A No.

Q You looked at the first two. The third question there—let's take them out of order. The third question, all that does ask you whether or not this was a provoked killing or was it an unprovoked killing. If **[3860]** you decide it was an unprovoked killing, you answer the question yes. Yes, it this was an unprovoked killing. Do you see what I'm getting at?

A Sure.

Q If on the other hand you decide there was some provocation that the victim did something to provoke the defendant into killing him, then you decide whether the defendant acted reasonably or unreasonably. Do you see how you could answer that question yes or no?

A Yes.

Q Okay. Now, let's turn to question number one. Does that cause you any problems at all?

A No.

Q Does that seem like a reasonable question to decide whether or not the defendant acted deliberately and with the reasonable expectation that someone was going to die, either the deceased or somebody else?

A That's a good question.

Q Do you see how you could answer that question yes or no?

A Yes.

[3861] Q Any problem with that?

A No problem.

Q Number two asks you, is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. What do you think you're being asked there?

A I think they want to know, if he got out again, would he act again.

Q All right. If he got out again, would he do it again?

A Yes.

Q All right. The key word may be that word probability. What do you think that word means? What do you think they're driving at with that question?

A Probably that he would do it again.

Q Would he probably do something like that again. You notice, Mr. Woods, that it didn't say would he probably do another capital murder or would he do another murder.

A A criminal act.

Q Of violence?

A Right.

[3862] Q What sorts of things come to your mind when you think of a criminal act of violence?

A Anything that you could do to harm somebody or kill someone or something like that.

Q Taking a baseball bat to Mr. Nelson, for example, and beating him up would be a criminal act of violence?

A Right.

Q Another murder, robbery, rape?

A Right.

Q What do you think would be valuable to you, what would aid you in answering that question yes? What would you want to know about someone before you would say, yeah, he would probably commit some criminal act of violence?

A It would depend on what we was talking about it, what I feel like that he might do and whatever kind of trouble that he was in, what we was trying him for.

Q What he did this time?

A Right.

Q Maybe what he did before, if he [3863] had done something before?

A That's what I would base that question on.

Q If you learned what role he had in the crime itself for which he's on trial, in other words you learn about if he was involved in the planning, did he plan it or did someone else plan it; during the offense, did he participate directly, was he calling the shots or was he standing by; did he have to kill this individual or did he not have to kill him. Do you see what I'm getting at?

A Right. That's the way I would answer that question.

Q Then after the crime, how did he react afterwards; was he sorry or was he just kind of blase about it? Do you see how you could learn enough about an individual to say, yeah, this is the guy that probably will do something like this again?

A Right.

Q In which case you answer the question yes?

A That's if we've already answered the question yes, he was involved and we're [3864] really wanting to know if he would do all these criminal acts again because ninety-nine

out of one, there's one that did at least two or three acts that way. They're going to constantly do it again.

Q You understand that these three questions are what separates life and death?

A Right.

Q If you answer one of the questions no, he gets a life sentence. If you answer all three of the questions yes, he gets a death sentence. I don't mean to keep harping on this, but do you know of any reason why, if you were on this jury and the proof convinced you that those questions should be answered yes, knowing that it's going to result in this roan over here being executed, do you know of any reason whatsoever why you wouldn't answer those questions yes?

A No, I don't know no reason at all.

Q Now, let's shift gears here for just a second, We've talked about life or death because that's the penalty for capital murder. A lesser offense of capital murder would be murder. Let's imagine just for a **[3865]** moment, as an example, that you're on a jury and let's say we charge the man—not this man, but some imaginary man—with capital murder. Let's say he committed murder during a rape. That's capital murder. We have to prove the murder and the rape. Got it?

A Right.

Q Let's say we prove the murder, but we don't prove the rape. You couldn't convict that person of capital murder under those circumstances because we didn't prove both of them, did we?

A No.

Q What did we prove?

A You proved murder.

Q If that were to happen, you would find him not guilty of capital murder and you would find him guilty of murder which is what we proved. Under a situation like that, Mr. Woods, the range of penalty is altogether different. It is no longer life or death. You just forget about that for

the moment. The range of penalty for murder is from five years to ninety-nine years or life. Can you see how broad that is?

[3866] A Yes.

Q The law allows you, if you sit on a murder jury, to find someone guilty of murder and consider the full range of penalty. Do you think you could do that?

A Yes.

Q I know you feel strongly about murder, don't you?

A Sure. I always feel that way. Anybody that go out and take somebody's life, I always feel that way.

Q By the same token, would you agree with me that there are all different types of murders and murderers and victims?

A Sure.

Q You know as well as I do, if we sat here for ten hours or ten days or ten minutes, we could think of a thousand or a million different situations where one person could end up killing another. Do you agree with that?

A Yes.

Q The law expects you, to be a qualified juror, to just say you will keep an open mind. Do you have an open mind?

[3867] A Sure.

Q Even though you consider all murders serious, you will agree with me, won't you, that some are more serious than others?

A Right.

Q Some killers deserve more time than others?

A Right. I agree.

Q Some may deserve less than others, right?

A Right.

Q All the law expects of you is to keep an open mind and wait until you've heard the evidence in a murder case. You haven't heard one stick of evidence so far, have you?

A No.

Q Just keep an open mind and tell us that you will follow the law and, if you hear a case that calls for the maximum and you think the right thing to do and the just thing to do, in other words, the proper thing to do is to give the maximum, you will give the maximum because you think he deserves it. Do you see what I'm getting at?

A Sure.

[3868] Q By the same token, you will keep an open mind and listen to all of the evidence in a murder case before you make up your mind and don't prejudge anything and just say, if you hear a case that calls for five years and you think that's the right thing to do even though it may be few and far between, if you hear a case that calls for the minimum and you know that's five years, you will give the minimum. Can you do that?

A Sure.

Q Any doubt in your mind about that?

A No.

Q Or anywhere in between, if you hear a case that calls for fifteen years, you will give that; twenty-five years, you will give that; fifty years. Can you do that?

A Sure.

Q Let me talk about one other thing. You understand that you don't have to imagine a situation where you would give five years or ninety-nine years or life?

A Right.

Q You've just got to say that you will keep an open mind. Will you do that?

[3869] A Right.

Q All right. The Judge will instruct you in regard to the law and the range of penalty for murder—this is kind of a strange situation, Mr. Woods. The law tells you about what we all know a little bit about and that's about the fact that people charged and convicted of murder and go to the penitentiary get paroled, don't they?

A Right.

Q There is such a thing as parole and such a thing as getting good-time towards parole and so forth. The Judge will give you some lengthy instructions when you go back to deliberate a murder case about these things. He tells you that a person—you get to know about these things, about parole and good-time. Then as soon as he gets through tell you that, he tells you that, because you cannot adequately predict how soon someone is going to get a parole or how that good-time is going to enter into it, you cannot consider either good-time or parole in deciding how much time a person ought to get for murder. Do you see what I'm getting at?

[3870] A Yes.

Q He tells you about it and then he says forget about it?

A Right.

Q That's not the Judge doing that. The Judge is just applying the law. You understand that?

A Yes.

Q In other words, you might listen to a murder case and say, well, under these facts I think he ought to get fifteen years or five years, but I think he's going to be paroled, so let's give him ten and then he will serve five years. That's a matter that comes up before the Board of Pardons and Paroles and the governor. It's really not your concern. Do you see what I'm getting at?

A Yes.

Q You just listen to the evidence that you have and you decide what the person ought to receive and not let the fact that a person could get good-time or parole. Can you do that?

A Yes.

Q Now, let me just ask you. Could **[3871]** you put aside your feelings—you said you had strong feelings about murder and murderers, that you think people who commit

bad murders ought to get something more than the death penalty; is that right?

A Yes, sir.

Q How do you square that with your thinking that you can give five years in a murder case or fifteen years?

A I don't think that's fair to just give a person something like that for going out to take people's life.

Q Do you think you could listen to a case and give five years if you thought it was proper?

A Give five years?

Q Yes.

A I don't feel like it's the right thing to give a person five years when I feel like he should get more.

Q Now, you understand that you haven't heard any evidence yet?

A I know. I wouldn't give him five years without hearing the evidence.

Q You're not going to give anyone **[3872]** ninety-nine years or life either, are you, until you hear the evidence?

A No. Right.

Q Are you telling me, Mr. Woods, what you're going to do is, even though all murders are bad, you will take into account all of the circumstances surrounding the murder and wait until you've heard all the facts to see how bad the murder is and what the relationship was between the guy that did the killing and the guy that got killed, what their backgrounds are, you know all of the realistic things that you can consider that would make one murder worse than another and, if you hear a case that calls for five years, you will give five years and, if you don't think it's worth five years, you will give ten years, fifteen years, twenty years and all the way up to ninety-nine years or life. Will you do that?

A Sure.

Q You understand that it may be a rare case where you're going to give five years and it maybe a rare case

where you would give ninety-nine years or life, would you agree with me?

[3873] A Sure.

Q It may take particular facts to give five years and real rare facts to give ninety-nine years or life, but if you hear them, you will give five years if you feel that's the right thing to do? Am I reading you right?

A Sure.

Q All right. I think I'm about out of time, but let me just ask you this: You understand that Mr. Miller-El here is presumed to be innocent. You understand that?

A Sure.

Q We've got to prove his guilt. You understand that the indictment is no evidence of guilt? That doesn't mean anything?

A Right.

Q You understand, if he doesn't want to testify, you can't hold that against him?

A Sure.

Q He may or may not testify. I don't know, but if he doesn't, you can't go back and say, well—you can't even discuss that fact. You can't say, well, that guy didn't take the stand, so he must be guilty. **[3874]** How do you feel about that?

A I can't prove nobody is guilty until they're proven guilty.

Q You understand that the State has got to do the proving?

A Right.

Q Can you go along with that?

A Sure.

Q You understand that you don't automatically believe the testimony of a police officer. Would you?

A No, I won't automatically believe anybody.

Q You would just judge the witnesses as they come; is that correct?

A Right.

Q Mr. Woods, I'm about out of questions here. I'm out of time, more important than that. Your favorite TV show is Rawhide; is that right?

A Right.

Q Is that still on?

A Yeah, it's still on.

Q On Channel 39?

A Yes.

[3875] Q I've seen the Lone Ranger on Sunday mornings. Let me just ask you: Do you have any questions at all of me, Mr. Woods?

A No.

Q Do you know of any reason why you can't be a fair and impartial juror to both sides?

A No, I don't know no reason at all.

Q It boils down to this, Mr. Woods: If we prove to you beyond a reasonable doubt that the Defendant is guilty just as he is charged in this indictment of capital murder, do you know of any reason why you wouldn't find the Defendant guilty of capital murder?

A No reason.

Q If we prove to you that these questions should be answered yes, do you know of any reason why you would not answer each question yes knowing that it would result in this Defendant being taken down to Huntsville and put to death?

A No reason at all.

Q I appreciate it, Mr. Woods.

MR. MACALUSO: I'll pass the witness.

[3876] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Woods, as you have been told, my name is Cunningham and along with Mr. West, to my left, we represent Mr. Miller-El in this case. I would like to ask you some questions concerning your questionnaire and possibly some questions concerning what Mr. Macaluso has asked you about. This may seem like a ridiculous question, but this is for the purposes of the record. What is your race?

A Negro.

Q Where is Harbor Road located?

A Oak Cliff, South Oak Cliff.

Q Are you buying there?

A Bought.

Q You own the house?

A Right.

Q How long have you owned your own home?

A My wife had it when she and I got married.

Q How long have you been living there with her?

A Twelve years.

[3877] Q You work for Stewarts Contract?

A Yes.

Q You're an assembler?

A Yes.

Q You've been with them thirteen years?

A Right.

Q How long have you been a Cowboys fan?

A Ever since they've been the Cowboys.

Q What do you think about a Redskin fan?

A I never was a Redskin fan.

Q How often do you go fishing?

A I go fishing every weekend.

Q Where do you go fishing?

A Lake Lavon.

Q Do you catch anything there?

A They're not biting.

Q How long have you been a member of Porter Temper Church?

A My wife is a member. I'm really a Baptist and my wife, since she and I got married, has become a CME.

[3878] Q In other words, she converted you?

A Well, no. As a kid I grew up in the CME. When I moved to Dallas in '56, I become a Baptist.

Q After you got married, you went back to what you were at the very beginning?

A Right.

Q Are there any members of your family or close friends who are in law enforcement?

A No.

Q You've never been in the military?

A No.

Q Do you know of any reason why you couldn't be a fair juror if chosen in this case?

A No.

MR. CUNNINGHAM: Pass the juror.

MR. MACALUSO: May we have a few minutes, Judge?

THE COURT: Surely. Mr. Woods, let me ask you to step out in the hail for just a few moments.

[3879] (Whereupon, Mr. Woods, left the courtroom, after which an off-the-record discussion was held, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State?

MR. MACALUSO: We'll accept the juror.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State, please, sir?

MR. MACALUSO: The State would be pleased to accept Mr. Woods as a juror on this case.

THE COURT: Mr. West?

MR. WEST: Your Honor, the defense would be pleased to accept Mr. Woods on this jury.

THE COURT: Thank you. Mr. Woods, let me do a couple of

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[4537] SANDRA R. HEARN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Hearn. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne. We're all assistant district attorneys here in Dallas and we're the lawyers for the State.

To Jim's left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Hi, Ms. Hearn.

To Mr. Cunningham's left is Mr. Royce West.

MR. WEST: Ms. Hearn, good afternoon.

Q They're the defense attorneys who have been appointed by the Court to represent the man charged with capital murder, the Defendant. His name is Thomas Joe Miller-El. **[4538]** Can you see him from where you're sitting?

A Not very well, but I can.

Q He's the man who is charged with capital murder. I've taken the time to reintroduce everyone here to let you hear our names again and reacquaint you with the roles that we play in the case and then simply to ask you if you recognize or know any of us?

A No.

Q Or ever heard of any of us?

A No.

Q Ms. Hearn, you are of course at this point a prospective juror in this capital murder case and, as the Judge said, we have eleven jurors and you could be number twelve. We need to talk to you just simply to see how you feel about some things, what your opinions are about certain aspects of the law and then we'll all make a decision. We're looking for the twelve people who ultimately we feel will be the most fair and the most impartial and best suited to listen to this type of a case and make some pretty important decisions.

Let me begin by telling you what we told everyone else to this point. Number **[4539]** one, we want you to relax. There are no right or wrong answers to any of the questions we're going to be asking you. No one is going to quibble with you or quarrel with you or nit-pick, argue with you, change your mind or try and talk you into anything. You just tell us what is on your mind and the way you honestly feel, you see, and you will be doing your job. If we ask the right questions, we will be doing our job. If you have a question at all at any time, don't be bashful. You ask the question. If there is something that you need to tell us, the same thing. You just say what is on your mind, whether we come within a country mile of it or not. Your opinion ultimately, I hope you understand, is what we're really seeking at this time. I'll blab on here sometimes and it will seem endlessly, but that's not the important thing. We want to know how you feel.

Now that I've said that, let me tell you how we think about one thing, what our position is. This is very important, that you know right off from the very outset what our position is regarding this case based on the evidence and the law. We are actively seeking **[4540]** the death penalty in this case for that man at the end of the table. We know that the law allows for it under certain circumstances and we feel we will be able to provide a jury once it is selected with the type and qualify of evidence that would convince them beyond a reasonable doubt as the law requires that the Defendant Thomas Joe Miller-El is guilty of capital murder precisely as he

is charged in this indictment. That's done in the first part of the trial.

In the second part, once again we have the burden of proof and the law would require us to provide the jury with the type and the quality of evidence that would convince them beyond any reasonable doubt that the questions should be answered yes. You know the result of all yes answers in a capital murder case is a mandatory sentence of death. Am I making myself clear?

A Yes.

Q That's just our position. Everyone has a position, as the old saying goes. But we want you to know in this type of a case that we are actively seeking the death **[4541]** penalty. Ultimately it is the decision of the jury that really counts and really will prevail, so that's why we need to talk to you and see how you feel.

Now, you were asked this question here the other day about—you were given precious little preparation and time, you know three lines, how do you feel about the death penalty. Why don't you just tell us or share with us in your own words how you do feel about the death penalty and secondly, any reason that you know of why you couldn't actually sit on a jury of this type and render a decision if called upon to do so that would result in the execution of another individual?

A Okay. I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on first offense. I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty.

Q In other words, you do believe in the death penalty?

A Yes.

[4542] Q For certain types of cases?

A Yes.

Q I gather from what you're saying, if you were on this jury, you would take any case or any capital murder case strictly on a case by case basis and judge that case on

its face as presented. The reason I say that is, you said that you have certain things in your mind, for example, that you would want to hear is that correct, before you feel the death penalty would be justified?

A Yes.

Q In other words, you said for repeat offenders?

A Right. In other words, like if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him, but if he goes to jail, serves time—if he gets out and he does it all over again and he's just a menace to society, yes.

Q In other words, you're talking about a continuing course of criminal conduct, serious type of criminal conduct?

A Right.

[4543] Q Would it have to be a series of murders or could it be something less—if you have a murder like a capital murder and something that precedes it, robbery?

A Yes. It would be according to the situation.

Q Again, you haven't heard any evidence and you cannot, of course, foreshadow testimony. You have to be guided by the facts, as I said earlier, and take it on a case by case basis. In other words, look at each individual case and each individual defendant and when you've heard all the facts render a decision?

A Right. You have to.

Q That's what the law expects of you and would actually require, that you base whatever verdict you reach in any criminal case, much less a capital murder case, on the facts once you've heard them. Can you do that?

A Yes.

Q All right. Now, you said you favored the death penalty is certain cases and for certain offense, I gather. What sort of offenses come to your mind that you think a **[4544]** person ought to receive the death penalty for?

A I think murder. I think severe torture of someone. I haven't thought this out. Extreme child abuse, especially.

Q Let me just tell you—you probably have some idea anyway. The law in Texas only allows for the death penalty in very special cases, in a very, very limited serious number of cases. It must be a murder to begin with and then it must be a very, very, special type of murder. The law has narrowed it down to where a person can only possibly receive the death penalty for a very, very few types of special murders. It's very, very selective.

In other words, even though you may feel it may be in order, as I might well, for certain other offenses—and I do—the law does not allow for it. I gather from what you've told us that regardless of your own feelings, you would be able to follow the law such as it is and it's only available for capital murder in Texas?

A Yes.

Q Here is a situation. Basically you have the offense of murder. That's what it **[4545]** is called in the penal code. It's not called first degree, second degree. It's just called murder. Murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or any legal justification. We will talk about that in a little bit more detail later.

You can't receive the death penalty for murder. No matter how gruesome a murder may be, no matter how mitigating a murder may be, it doesn't really matter. The death penalty cannot under the law be imposed for what we call for these purposes regular murder. If you commit a murder of somebody, a particular class of individual like a police officer or a fireman in the line of duty, a jail guard, if you commit a mass murder or you commit a murder for hire, under those circumstances murder becomes elevated to the level of capital murder, a capital offense, for, which you can receive either a sentence of death or a sentence of life. Am I making myself clear?

A Yes.

Q One other type of capital murder **[4546]** is where you commit murder plus, murder while in the course of

committing another very serious felony, like murder during a rape, murder during a robbery, murder during a burglary, kidnapping or arson. The law says under those circumstances coupled with murder, you see murder plus or murder of that class of individual, mass murder, murder for hire and so forth and so on, those very limited special types of murders, you can receive either a sentence of death or a sentence of life. How does that square basically with your thinking? Do you agree with that?

A I agree.

Q In other words, certainly not every murder must be a capital murder and then not even every capital murder, you see, because it's either a sentence of life or a sentence of death depending upon the answers to the questions that are given to the jury in the second part of the trial. Am I making myself clear?

A Yes.

Q Now, let me just ask you a couple more questions about how you feel about the **[4547]** death penalty. You're a young woman, of course. Are your folks still alive?

A Yes.

Q Do you know how your mom and dad feel about the death penalty or would you hazard a guess?

A I don't know how my mother feels. My father believes in it, but I don't know how to elaborate beyond that.

Q Have you ever been opposed to the death penalty? Has there ever been a time in your life when you felt differently? Not necessarily opposed, but felt differently?

A No.

Q Now, let's talk a little bit about the procedure in any criminal case. These are things that are going to sound like a seventh grade civics lecture, but they're fundamental and we all know about these things. When we're talking about making life and death decisions in a capital murder case, then they kind of take on a new meaning, I think.

The first thing is—I don't think you're going to have any problem with any of these. The first thing is, the starting **[4548]** point of any criminal trial whether it be shoplifting or capital murder, is the presumption of innocence of the accused. I guess that's what separates our form of government to a large extent from the type we have in other countries. In other countries you're presumed guilty and you have to prove your innocence. Obviously it's not that way here. You must, of course, to be a qualified juror as the eleven other people we have on this jury already, presume Thomas Joe Miller-El to be innocent as he sits here. Can you do that?

A Yes.

Q In other words, it doesn't mean he is, in fact, innocent. It just means that's the starting point. The State must prove his guilt by evidence beyond a reasonable doubt or he's clothed with that presumption of innocence. It's just the same as you would be, your mom or dad, me or anyone else. Fair enough? Can you do that?

A Yes.

Q In other words, some people might say, you know, he's been arrested and obviously **[4549]** he's here in the courtroom and he's been indicted by a Grand Jury. You know, he must be a little bit guilty. You understand that's not how the law works at all. You're not a little bit guilty. You are either guilty because the State proves are guilty or you are just flat innocent. Can you abide by that?

A Yes.

4 In other words, you don't abide by that saying, where there is smoke, there's fire?

A No.

Q- You can presume the Defendant to be innocent as he sits there?

A What your saying is, the Defendant, as this trial goes on, is either going to have the death penalty imposed or he's going to be innocent?

Q We'll talk about that later. We're just talking about guilt or innocence.

A No, I don't have any problems with that.

4 Okay. Now, the same thing—you know the burden of proof is always on the State. We've brought forth this indictment and **[4550]** we have the burden of proof. We must convince you, if you're on this jury, and the eleven other people that the Defendant is guilty of capital murder beyond a reasonable doubt. If we do, you should find the Defendant guilty. If we don't, your oath would require you to find him not guilty. It's really pretty cut and dry. If we prove our case, we're entitled to a verdict of guilty. If we don't, he is definitely entitled to a verdict of not guilty. We don't quarrel with that. Any problem in that regard?

A No.

Q You understand that the indictment is no evidence of guilt. No matter how bad an indictment sounds—sometimes you see in the paper where it says, Billy Sol Estes indicted for this or so and so indicted for that. An indictment is not a finding of guilty whatsoever. Otherwise there would be no need to have a jury trial, would there?

A No.

Q Or a trial by a judge, for that matter. All an indictment is, is a legal document that sets out the accusation and tells **[4551]** him what he is charged with and tells us what we must prove to you if we expect you to find him guilty. No matter how horrible it sounds, whether it's capital murder, shoplifting, a DWI, it doesn't matter. The State must prove what is in the indictment or it is meaningless. Do you see what I'm getting at?

A Yes.

Q It is no evidence whatsoever. In other words, if we just read the indictment to you and the other jurors and we sat down and didn't offer any proof, you would have to find the defendant not guilty. It's as simple as that. Any problem with that at all?

A No.

Q As I said, the burden of proof is on the State and it is always on the State. In both phases of the trial in a capital murder case, the burden of proof is always on the State. We have to do all of the proving and they have to do none. We don't quarrel with that for a second. We know what the law requires of us and we're not quarreling or quibbling about that for a minute. We have pointed the legal finger at him, which the law **[4552]** allows us to do, and the law says fine. Therefore, we must do all, every last bit, of the proving. If we do, we're entitled to that verdict of guilty. If we don't, you find him not guilty. Any problem in that regard?

A No.

Q Furthermore, the counterpart of that is, while we have the sole burden of proof and we have to prove everything, they have nothing to prove and, as important, they have nothing to disprove. We've done the accusing and we must do the proving. The only obligation a defendant has in any criminal case is to be here during the trial. That's all. He doesn't have to call witnesses and doesn't have to testify. He doesn't have to say a word or have his lawyers call a witness. If the State doesn't prove its case, whether the defendant testifies or not, if the State doesn't prove its case and the defendant doesn't call any witnesses, it doesn't matter. You have to find the defendant not guilty. Do you understand that?

A Yes, sir.

Q You look to the State. You must **[4553]** look to the State as the accuser to do all the proving.

Now, the Fifth Amendment privilege applies to you, me or any one of our loved ones. It says basically that the person who is charged with a criminal offense cannot be compelled to testify in a trial if he doesn't want to. Furthermore, if the person chooses not to testify, which they have a constitutional and guaranteed right not to do, a juror or a jury cannot consider that as any evidence whatsoever of the defendant's guilt. Do you see what I'm getting at?

A Yes.

Q In other words, if the defendant testifies, fine. He has the right to that. If he wants to call witnesses, fine. You listen to them as you would any other witnesses. If he chooses not to testify, as he has a right to, because we have to do the proving. He has nothing to prove. If he chooses not to testify, you cannot hold that against him. Like the Judge would instruct you, you can't consider that in your deliberations. You can't hold it against hint as any evidence whatsoever. **[4554]** Can you abide by that?

A Yes.

Q Can you tell us that you would not consider the failure of a defendant to not testify or call witnesses against him at all?

A I'm sorry.

Q Are you saying—are you able to tell the defendant and tell all of us here that, if the defendant fails to testify and chooses not to, as he has a right not to, you will not hold that against him at all?

A Yes.

Q Not even talk about it and not even consider it?

A No.

Q Okay. Now, let's talk about criminal trials in general. They are divided into two parts. The first part concerns itself only with the guilt or the innocence that is in this charge, if the State proves the indictment or if we fail to prove it. If we fail to prove it, you find the defendant not guilty and everybody goes home. If you find the defendant guilty because the State has proven to you beyond a reasonable doubt the **[4555]** offense, then we go on into the second part of the trial. That's the part where you decide what the penalty ought to be. In a capital murder case, it is either death or life and that determination is made on the basis of the jury's answers to these three questions that the Judge gives the jury at the end of the evidence phase of the trial. Am I making myself clear?

A Yes, sir.

Q You know the result. All yes answers equals death. There is no question about that. Even though you don't write death in there, you write yes, yes, yes, it's tantamount to writing death because the law would then require the Judge by law, mandatorially, absolutely, to sentence Thomas Joe Miller-El to be executed. The same thing would hold true if we failed to prove to you that those questions all should be answered yes. In other words, if you answer one or more of them no, the law likewise requires the Judge to take a particular course of action and that would be a mandatory sentence of life. Whether he likes it or not, he can't override either of **[4556]** your verdicts. Am I making myself clear?

A Yes, sir.

Q Any problem with that procedure so far as you know?

A No.

Q The questions are over there on your left. I want you to bear in mind that the State has the burden of proving to you in the second part of the trial that those questions should be answered yes just as we have the burden in the first part of the trial to convince you of the defendant's guilt. Do you see what I'm getting at?

A Yes.

Q The burden of proof is always on the State and you must tell us, and your oath as a juror would require you to keep the burden where it belongs, at this table. Tell us you will make us prove and will require that we give you proof to convince you beyond a reasonable doubt that the defendant is guilty and tell us that you will require proof to convince you beyond a reasonable doubt that those three questions should be answered yes. Otherwise, you will answer them no. Otherwise, **[4557]** you will find the defendant not guilty. Can you do that?

A Yes.

Q I think you may have had a chance to look at two of those questions when you sat out there endlessly on Monday. Do you have any questions about those at all?

A No.

Q Number three, you may or may not have been able to see.

A No questions.

Q Okay. Bear in mind that you will only be called upon to answer those three questions assuming hypothetically that you are on a capital murder jury who has convicted somebody — we won't even talk about Mr. Miller-El from now on — of capital murder. You've heard all the evidence in the first part of the trial. You've heard whatever evidence may be presented to you in the second part of the trial and you may receive some and you may not. You've heard all of the evidence, in any case.

The judge would give you those questions and you and the other jurors would go **[4558]** back in the jury room and decide whether or not the State has shouldered its burden and convinced you beyond a reasonable doubt that they should be answered yes. If not, you answer them no.

The first one there, let's just take a peek at that. Any questions about that at all?

A No.

Q It's is pretty straight forward, isn't it? Do you see how you could answer that question yes or no depending on the type of evidence that you receive?

A Yes.

Q If you believe it should be answered yes beyond a reasonable doubt, you answer it that way. If not, you answer it no.

Let's go on to number two there. What do you think is being asked there, Ms. Hearn?

A I'm sorry. I have double vision right now and I have to yet my eyes in focus.

Q Just take whatever time you need.

A Bear with me.

Q Sure. I'm reading this question **[4559]** to mean that the defendant would commit crime that would be a menace to society. Am I correct?

Q That's for you to decide. You see the Judge won't give you definitions or any guidelines as to what those questions mean. It's for you and the other jurors to decide. You decide what they mean and that's what they mean. I think we could agree that's a question that looks towards future conduct?

A Yes.

Q And the key word may be that word probability. What does that word probability mean to you in the context of that question?

A A possibility.

Q Whether there is a possibility that the defendant would commit criminal acts of violence in the future. Fair enough?

A Yes.

Q What sort of offenses come to your mind when you think of criminal acts of violence?

A Oh, heavens—murder, rape, abuse to other human beings.

Q If we convince you beyond a **[4560]** reasonable doubt that he would probably commit some future acts of criminal violence, you would answer the question yes; is that correct?

A Yes.

Q You understand that a criminal offense—let's take a capital murder, for example—could be divided into three parts like anything, I guess, really; What happens immediately before, what happens during and what happens after. Would you agree with me?

A Yes.

Q In other words, when you learn about the planning, if any, involved in a capital murder, what role did the defen-

dant have in that planning, if any? Did he plan it or did someone else do it or was it a spur of the moment? During the offense did he take a key role or a passive role? Was he a leader or was he a follower? Was he calling the shots or standing alongside? Did he have to do the killing? Was it necessary or could he have done something else? Do you see? Then afterwards, was he sorrowful, contrite, remorseful for what had happened or was he nonchalant and blasé [sic] where he couldn't have **[4561]** cared less? Do you see what I'm getting at?

A Yes.

Q Allowing that you could hear all that sort of evidence in the first part of the trial when you learn all the dynamics and the full spectrum of behavior, do you think you could learn enough about an individual where you feel you could answer that question yes, this is the type of individual based on what I've learned about him so far that would probably commit some criminal acts of violence in the future?

A No, I can't say I could answer that.

Q Any particular reason?

A Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that.

Q Let me just ask you—

A I could the past, but I couldn't the future part of it.

Q Let me just ask you this: What would be most valuable to you—what would you want to know about somebody to enable you to answer that question yes?

[4562] A I think it would be what they had done in the past, what the evidence—the hard evidence instead of a supposition.

Q If you had all the information I've described, the before, the during and after, and then you learn about the person's prior criminal behavior, if they had a prior criminal record, do you think that would enable you to answer that question yes?

A Yes.

Q The third question you may or may not receive. That basically and simply asks you whether or not it was a provoked killing or an unprovoked killing. Do you see how you could answer that question yes or no?

A Yes.

Q I just want to emphasize, of course, as I said before, that the burden of proof in both phases of the trial is solely and exclusively on the State. Just because you convict somebody of capital murder, that does not mean that he automatically receives the death penalty.

A Right.

Q He automatically receives a life **[4563]** sentence unless we convince you that those questions should be answered yes. Can you do that?

A Yes.

Q Let's shift gears here one second. Let's suppose for example that you're on a capital murder jury and you've found somebody—you've heard a capital murder case where the indictment alleges a murder during a burglary. That's one type of capital murder. We prove the murder, but we don't prove the burglary aspect of it. You understand that we would be required to prove both, the murder and the burglary. If that were to happen and you're on the jury, you would have to find that defendant not guilty of capital murder because we didn't prove capital murder, did we? What did we prove?

A Murder.

Q If that were to happen, you can forget all about what we talked about, life or death, because those are not penalties for the offense of murder. The law in Texas sets out the very, very, very broad range of punishment for a person convicted of murder, not capital **[4564]** murder, but what we will call regular murder. That range is as broad as it is for any offense in Texas. It's from five years to ninety-nine years or life. The reason for that is, I think you can understand, the law allows and takes into consideration that

there are an infinite number of circumstances where one person can commit the offense of murder. Would you agree with me?

A Yes.

Q You have to take it on a case by case basis. The law gives you that latitude as a reasonable open-minded person to say I'll follow the law and if the law is from five years to ninety-nine years or life, I'll consider that. I'll keep an open mind to that full range of penalty and I will wait until I hear all the evidence in a murder case. I don't care, I'm not going to prejudge anyone. I'll just wait and listen. If I hear a case that calls for the maximum and I think it is proper and the right thing to do based on all the circumstances and all of the evidence that I hear, I'll give it. If I hear a case to my way of thinking deserves, warrants and calls **[4565]** for the minimum, because I think that's the proper thing to do based on everything I learned, you know, once I hear the evidence, I'll give that whether it be five years on the bottom or ninety-nine years on the top or a life sentence. Would that be fair enough?

A Yes.

Q Can you do that?

A Yes.

Q In other words, you have an open mind and would continue to keep an open mind?

A Yes.

Q Now, we all know that murder is a situation where one person knowingly or intentionally causes the death of another. It's not self-defense. It's not an accident and we all know that. It's not an insanity situation. It's not a crime of passion where someone acts in a rage of sudden passion or a crime of passion like a father killing—

MR. CUNNINGHAM: Your Honor, we would object to counsel giving the juror specific factual examples.

THE COURT: I'll overrule **[4566]** the objection to that particular—as I understand it, you're giving an example of

what might constitute an offense and not in regards to any kind of punishment that this juror might assess?

MR. MACALUSO: That's true, Your Honor.

MR. CUNNINGHAM: Note our exception.

Q Do you see what I'm getting at?

A Yes.

Q All we're expecting you to do, which is what you said you can do, is number one follow the law because you respect the law. Am I reading you correctly?

A Yes, sir.

Q Do you have an open mind?

A Yes.

Q Will you continue to keep an open mind throughout a trial if you're on a murder case and wait until you've heard all of the evidence?

A I would try.

[4567] Q In other words, you haven't closed your mind to the minimum or the maximum for the offense of murder, the maximum penalty, have you?

A No.

Q It may be difficult for you to give ninety-nine years or life for murder, but would you do it?

A Yes.

Q You would have to hear special facts before you feel it would be actually warranted, ninety-nine years or life?

A They would have to be proved guilty.

Q And then it would have to be very special aggravated facts, wouldn't it?

A Right.

Q The same thing would hold true for the minimum, wouldn't it? Before you would give five years for murder, you would have to hear special facts, wouldn't you?

A Yes.

Q But if you felt it was proper to give five years for the offense of murder, would you give five years for murder after **[4568]** you've heard the evidence?

A Yes.

Q Let me talk about one or two other things here now. One is—and this is going to be kind of strange because the law and the Judge would actually tell you, if you serve on a murder case and found somebody guilty of murder, the Judge would instruct you as to the range of penalty. Then he would talk to you about what we all have heard about. That's parole. The Judge would instruct you and tell you that there is such a thing and there's such a thing at [sic] the Texas Department of Corrections calls good-time and a person who is sent to the penitentiary can acquire or accumulate good-time—they call it good behavior time—toward parole. Now the Judge would instruct you as to that and then he would go on and tell you that the decision as to any kind of parole matters is not his decision and it's not your decision. It's exclusively within the responsibility of the Texas Board of Pardons and Paroles and the governor. On the one hand the Judge is required by law to instruct you about parole and then the next thing he says, **[4569]** you can't control it because he can't control it and the lawyers can't control it, so you cannot consider that in assessing any particular number of years. Am I making myself clear?

A Yes, sir.

Q It's like here it is, now ignore it. The law would require you and the Judge would instruct you that you cannot consider parole in assessing a number of years you feel is proper in a murder case or any other case, for that matter. Can you do that?

A Yes.

Q Would you put that out of your mind, in other words, as the Judge would require you to do that?

A Yes.

Q In other words, if you hear a murder case that you think calls for five years and that's the proper thing to do,

you would give five years. You don't give ten years thinking, well, he will be paroled and I want him to get five years. Do you see what I'm getting at?

A Yes.

[4570] Q Can you do that?

A Yes.

Q One other matter here. I notice here that your dad is an FBI agent?

A Was.

Q And you have apparently a great deal of respect for the police officers that you work with; is that correct?

A Yes, sir.

Q Here is a situation that I think you can handle very easily. The law says that as a juror you decide the credibility of the witnesses who testify. You decide how much or how little of any witness you wish to believe. You can believe all, part or none of what a witness testifies to. The law is very specific about this. That is, that you should judge all witnesses by the same yardstick, so to speak. You don't automatically—a juror does not bless anybody with any more credibility or believability just because of their occupation, profession or their station in life. In other words, you start everybody out at the same point . Like Mr. Nelson says, it's kind of like a race. You start everyone off at the same **[4571]** line and as they testify, you decide whether or not some pull ahead of somebody else or someone falls behind, but you don't prejudge anybody. You don't start someone up here because, for example, they're a minister, or a doctor or a police officer, an FBI agent, or put someone behind because they're a skid row bum or they don't look good or whatever it may be. Do you see what I'm getting at?

A Yes.

Q Now obviously as they testify, a person may be more qualified in a particular area. You may feel a doctor obviously, once he begins to testify, is more qualified in the field of medicine or a police officer may be more qualified in

some areas about a police report. You wouldn't automatically believe or disbelieve anybody just because they're a police officer or a fireman, would you, or an FBI agent?

A Well, no because I believe, if anybody swears to God that they're going to tell the truth and take the stand, that they are.

Q And anybody can make a mistake, **[4572]** couldn't they? Anybody, whether it be a doctor or a police officer, could make a mistake?

A Sure.

Q I suppose anybody, including a doctor or a lawyer, a police officer, FBI agent, could even lie. I gather you could believe that, couldn't you? A police officer could lie about something.

A The ones that I know I don't think would lie purposely.

Q That's right.

A It would be a mistake.

Q Then you haven't met them all, have you?

A No.

Q That's what I'm getting at. You have to just say I won't automatically believe or disbelieve anybody. I'll wait and hear what they have to say. If I believe them, fine. If I don't, fine. Can you do that?

A Yes, sir.

Q Now, I've done a lot of talking and I'm about out of time. Let me just ask you this: Do you know of any reason whatsoever why you couldn't be completely fair and impartial **[4573]** to both sides in this case?

A No, sir.

Q Whether you work with police officers or your dad was an FBI agent or not, you're going to make the State prove its case beyond a reasonable doubt, aren't you?

A Yes.

Q If we prove it to you, you said you would find a defendant guilty; is that correct?

A Yes.

Q And just as sure as you're sitting there, if we don't prove it to you beyond a reasonable doubt, would you have any qualms at all about finding the defendant not guilty?

A No.

Q And you would find him not guilty; is that correct?

A Yes. I'm sorry. I hesitated there because I was—I'm taking all this in. This is a first experience for me.

Q In the second part of the trial, you will make us—the law requires this. You will make us prove that those three questions should be answered yes; is that correct?

[4574] A Yes.

Q And if we don't, will you-answer them no?

A Yes. Do you mean all or partially?

Q The burden of proof is on us at all times in both phases of the trial to convince you beyond a reasonable doubt first that the defendant is guilty and second, third and fourth that those questions should be answered yes. If we don't, you find him not guilty or you answer the questions no.

A Right.

A Fair enough?

A Fair.

Q You will keep an open mind as to the full range of penalty for murder?

A Yes.

Q You've been real polite and real kind to me and I appreciate. Thank you. Mr. Cunningham is going to have some questions for you now.

MR. MACALUSO: I'll pass the juror.

[4575]

EXAMINATION

BY MR. CUNNINGHAM:

Q Ms. Hearn, as you've been advised, my name is Cunningham and along with Mr. West to my right, we represent Mr. Miller-El who is charged with the offense of capital murder in this case. I'd like to talk with you concerning some of your responses to Mr. Macaluso and also ask you about some of the information contained on the questionnaire that you filled out on Monday.

Let me say at the outset that no one is going to argue with you. No one is going to quarrel with you. No one is going to try to convince Ms. Hearn that any answer that she gives with respect to any question is a wrong answer. For once in your lifetime, you cannot give a wrong answer. Any answer you tell us and the Court is a correct answer because that answer tells us lawyers and the Court how Ms. Hearn feels about various aspects of the law. It also helps us, helps the lawyers, in their effort to determine whether or not Ms. Hearn would be a fair and impartial juror if chosen in this case and that she does **[4576]** not have any bias or prejudice in her feelings either for or against the State or for or against the citizen accused in the case.

With that in mind and with that understanding, I hope that you will be as candid with me as you were with Judge McDowell on Monday and as you were with Mr. Macaluso a little while ago. Would you do that, also?

A Yes.

Q Where is Bent Tree Forest?

A Far North Dallas, north of Prestonwood Mall.

Q Is it near Bent Tree Country Club?

A Yes, I think. I'm not a member there.

Q Is that an integrated neighborhood?

A As far as I know, yes. I mean we have Hispanics and blacks living in the neighborhood.

Q Okay. And 2210 is an apartment complex?

A A condominium.

Q Are there any blacks living in the condominium where—well, is there more than **[4577]** one?

A Yes. From what I know, there are three families.

Q How many condominiums in the complex?

A I have—roughly a hundred.

Q Do you know the three black families that live there?

A I know one of them.

Q Where is he employed? Is he employed in University Park?

A No.

Q IBM, Xerox?

A Southwestern Bell.

Q What is their name?

A Their name is Herbert and Juanita Miller.

Q Do they have any children?

A Two, a little boy and a little girl.

Q You're employed by the City of University Park?

A Yes.

Q You're a purchasing agent?

A Yes.

[4578] Q Is that for the entire city of University Park:

A Yes, sir.

Q As a result of your employment as purchasing agent, you have daily contact with police officers in University Park?

A Yes, sir.

Q Do you have contact with any other police officers?

A No.

Q Does your father live here in Dallas?

A No, in Tennessee.

Q Well, I notice that he retired in 1965?

A I think, or '64, one.

Q Is he doing anything other than probably playing golf and tennis or is he doing any type of work?

A No. He had employment after he retired from the FBI, but then he has retired from that job, also.

Q The job that he took after he left the FBI, was that in some form of security?

A No, it was with a bank as a trust **[4579]** officer.

Q How long have you been with the City of University Park?

A Almost two years.

Q Were you employed any place else before the City of University Park?

A Yes, sir, Sun Belt Service Corporation, which is a bank, a holding company.

Q What did you do for Sun Belt?

A Director of purchasing.

Q In other words, the same type of job?

A Yes, sir.

Q And you went from Sun Belt to the City of University Park?

A Yes.

Q How long have you been a member of Prestonwood Baptist?

A Almost a year now—well, I'm not a member. I just attend their regularly, since last Easter.

Q Is that an integrated church?

A Yes.

Q Do the Millers go to Prestonwood **[4580]** Baptist?

A No.

Q You indicated that you believe in the death penalty; is that correct?

A Yes, sir.

Q That there has never been a time when you did not believe in the death penalty?

A No.

Q Would you attribute that to the fact that your father was engaged in law enforcement during the time that you were growing up, your childhood, junior and senior high schools and off to college?

A No, sir. That's my own belief from news media. Well, just hearing about the various court—well, various cases and the outcome of them.

Q As a result of hearing about the cases, you formed in your mind that there was—one, that you believe in the death penalty and two, that the death penalty serves some purpose in the community and in society?

A Yes.

Q The purpose that you feel the death penalty serves is what, if any?

[4581] A I think it's just putting away a person that really does not belong in our society at all. May I give an example here?

Q Yes, ma'am.

A There was a case not long ago in University Park to where a man posing as a lady scalded—well, you probably know about this—a four month old baby from its waist down. I saw these pictures and he was sentenced to life and my own opinion is that he should have had the death penalty.

Q Because of what he did to that child?

A Right—well, the child ended up dying. It couldn't possibly have lived. That's how I formed my decision.

Q I believe you indicated to Mr. Macaluso that where a person commits murder or a person severely tortures another person or extreme child abuse, that person who commits those offenses should receive the death penalty?

A Yes, sir.

Q You believe that strongly and you have believed that at least for a period of **[4582]** time?

A Yes, sir.

Q You understand that in Texas and under our present statute, a person who commits the offense of "regular"—and that's a bad word, but that's the only way, I guess, I can explain it—murder cannot receive the death penalty?

A Yes, sir, now I do.

Q Also, that a person—when you say severe torture, could you tell me what you have in mind?

A Well, that child.

Q The child where a person dressed up as a woman and then scalded the child to such an extent that the child died?

A Right. Well, it was just murder and I didn't think of that when I pointed that out as an example.

Q In an instance like that, you sincerely believe that person should receive the death penalty?

A Yes.

Q You also understand that under our statutes that presently exist, a person who **[4583]** commits that type of offense or a person who severely tortures another person which leads to that person's death is not punishable by the death penalty?

A Yes, sir.

Q Also, a person who is guilty of extreme child abuse, that in and of itself is not punishable by the death penalty under our statutes, but you believe the person who does that should receive the death penalty; is that correct?

A Yes, sir.

Q And you believe regardless of what the statute says that the range of punishment is for a person who commits murder or a person who severely tortures another or extreme child abuse, you still believe that person should receive the death penalty?

A Now—

Q Because of the facts involved with respect to those types of offenses?

A I can't really say that. I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no, I do **[4584]** not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation.

Q You've added another factor, the factor of age.

A Right. I pointed that other example out because it was a man doing that to a four month old baby who could not defend itself or anything. When there are adults involved, two adults involved that are responsible per se, especially for their own actions—I shouldn't have pointed that out. I'm getting all confused. In other words, I do not believe in the death penalty on first offense murder unless it is a child involved, defenseless child. I'm getting myself all mixed up. I'm embarrassed.

Q As I said earlier, you cannot give a wrong answer. It tells us how Ms. Hearns feels. If I understand what you're saying, a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty; is that correct?

A Yes, sir.

[4585] Q Regardless of what the facts are, regardless of what the circumstances are?

A Yes.

Q However, in an instance where a young child is involved and you added defenseless, it is your feeling that the person who commits that offense against that child and that child dies, then the person should receive the death penalty?

A Yes, sir.

Q Even though the law says the person cannot receive the death penalty?

A Yes, sir. I still believe that, which makes no sense, I know.

Q Would you be able to put out of your mind and if you had that type of case that you have designed and you have indicated, just put your personal feelings aside and decide that case based upon the facts and circumstances and, if you believe that the proper punishment from the facts and circumstances called for ninety-nine years, could you give ninety-nine years?

A You're talking about the child?

Q Yes, ma'am.

[4586] A If the maximum I could give him was ninety-nine years?

Q Yes.

A Then I would push for the maximum. If I could give the death penalty, I would want to give the maximum to him.

Q As I indicated, in Texas the law says that is not capital murder. The range of punishment would be life and an optional fine of $10,000.00, ninety-nine years down to five. That would be the range of punishment for that type of offense. It is my understanding, if you heard those facts and those circumstances and you believed that the proper punishment called for life and a $10,000.00 fine and that was the highest you could give, that's what you would give?

A Yes, sir, it is.

Q Nothing less than that?

A No.

Q Under any circumstances?

A No. As long as he was proved guilty.

Q In other words, we cannot give you factual situations. In other words, I cannot **[4587]** give you a fact situation and say, Ms. Hearn, what would you do in this instance. All I can do is tell you what the range of punishment is and in this hypothetical we assume that, one, the person has been found guilty beyond a reasonable doubt and that the jury is there deliberating on what the proper punishment is for the factual situation that they have heard. This presumption is that the person has been found guilty beyond a reasonable doubt and the jury is trying to decide what the proper punishment is and it is my understanding, in that type of situation, the proper punishment you feel is life because that's the most you can give and/or a $10,000.00 fine?

A Yes.

Q Under no circumstances would you give anything less than that; is that true?

A Now, I guess I could would have to say no to that. It's so hard to answer some of these. You know you have to take it on a case by case basis, I would say, to really answer that right. You know, I'm sitting here trying to give you answers to get insight to me, but yet it's so hard because without having **[4588]** everything laid out—as you said, pointing out an example or something.

Q Earlier this morning another prospective juror said almost those identical words and probably—I don't know how many we've talked with, but probably I would say seventy-five to eighty percent of those that we actually talked with in some form or another said the same thing. The law says that we cannot give you examples. If I started to give you an example or a factual situation and said, Ms. Hearn, what would you do in this type of situation, the Judge would stop—first of all, he would be standing up hollering Judge, Judge, and then the Judge would sustain the objection because—so I can't give you a factual situation. The only thing I can tell you based upon what you have told me and in that instance, one, you know what the range of punishment is and, two, I understood you to say in that situation, since life is the most that you could give and/or an optional fine, that's what you would do; is that correct?

A I'm thinking of this example of this man, yes, you bet.

[4589] Q You would never give five years?

A Not to that particular case, but to another case, I might.

Q I believe you indicated that you come in contact with police officers every day?

A Yes, sir.

Q Have you indicated to anyone that you are a prospective juror for a jury where the capital punishment was involved?

A No, sir—yes, I have. My boy friend. I didn't discuss anything. I just -

Q That you as a prospective juror in a capital murder case?

A Not to any policemen, no, sir.

Q What does your boy friend do?

A He's laid off right now. He was an accountant for an oil company. Need I say more?

Q And the oil company went broke?

A Well, almost.

Q What is the autobiography of Jim Thompson?

A He was the man that went over and did all this silk in Thailand and opened up a shop. He was an importer of fine silk out of **[4590]** Thailand. He opened up a shop. It was very interesting. It was a gift.

Q You indicated that you read a book about a murder trial. Can I ask you what book and what murder trial?

A Well, Helter Skelter, I've read. I know I've read some and I watch Perry Mason every Sunday night. Oh, I can't think.

Q I hope the Judge won't apply this to my time, but I've got to tell you this.

THE COURT: I'll stop it for a minute.

Q Perry Mason is the worse thing that ever happened to the legal profession. I have been practicing probably—this is my twenty-sixth year and I would say Mr. Macaluso has been practicing for about fourteen and if you add ours together and if we add the Judge's, probably about twenty-six, there has yet to be one person that stands up in the

back, like the person in the last row, and says in the last five minutes and say, "I did it." Because if it ever happened, you will hear of Brice Cunningham having a major heart attack in the courthouse where it happens. That's TV and **[4591]** please cast that out of your mind.

First of all, let me give you a good example. All the witnesses in Perry Mason sit in the courtroom and hear everything that every other witness says. One of the first things the Judge is going to do in this case is swear the witnesses and then the rule will, in all probability, be invoked. The rule meaning that the witnesses cannot stay in the courtroom. Whatever you have seen on Perry Mason, please disregard it.

A I read a lot. I can't think of books I've read, but I know I have. I like mysteries. A lot of them may be fiction.

Q When you say you deal directly with the police department on a daily basis in University Park, could you kind of expand on that for me? What do you do?

A Yes, sir. It's mainly the chief lieutenant and captain that I deal with. They submit requisitions for purchases to me for various items that are needed and ninety-nine percent of the time questions are needed. They aren't putting down enough information or deliveries are messed up, you know, payment of **[4592]** the invoice that they have ordered from their authority, et cetera.

Q Then in answer to number forty-two you said, "Through work—cannot say enough good things about our policemen—and my father and his regard for Hoover." In other words, you have a high regard, I would assume, for the police officers at University Park?

A The highest.

Q Tops?

A Right.

Q You have the same regard for your father as the result of his work as a special agent for the Federal Bureau of Investigation?

A Yes.

Q And also you have a highest regards for J. Edgar Hoover?

A Well, my father does. From what daddy has told me that's, I'm sure, a prejudice of his, but I do.

Q In this case there would probably be a number of police officers and some people believe that—well, some people give more credibility to the testimony of a police officer simply because he is a police officer **[4593]** than any other witness. They said that's just the way I believe. That's based upon my belief, my training and in some instances it was because of their association with police officers. It may be because they have memories of their family who are police officers or people who are in law enforcement. They said because of my association with police officers, because of my association with person [sic] who are engaged in law enforcement and because of their training, their experience and all of that, they are not going to purposely get up and say something that is not true. Therefore, if I hear a police officer, I'm going to believe them quicker than I would, say, a lawyer or a defense counsel or the defendant or a ditch digger or something like that. First of all, there is nothing wrong with feeling that way. There's nothing wrong with believing that way and no one gets mad at those feelings.

However, the law says that because that person feels that way and believes that way and in effect gives an advantage to the testimony of a police officer, those person [sic] are not proper—would not be proper jurors in a **[4594]** criminal case. I made all that long speech to ask you whether or not because of the highest and top regard that you have for University police officers, the fact that your father was an FBI agent for the Federal Bureau of Investigation and your father's high regard for J. Edgar Hoover, which you relied upon, whether or not you would give more credibility to the testimony of a police officer simply because he is a police officer than any other lay witness?

A Well, I can't really say that because I know as nervous as I am, if I was a witness—if I was a witness and I

told a juror that, yes, I would put more credibility in the policeman because he has had a lot more practice going up on the jury stand and testifying and he's not that nervous, but anybody who would swear to tell the truth, you know swear to their God, you would have to say they're telling the truth. No, I can't really say—a policeman has just had more experience in testifying and being before a court. I think I would treat everybody equal in that.

Q You understand when a policeman testifies, he is testifying with respect to **[4595]** what he says is a factual situation?

A Right

Q And it's not whether or not he has testified more often than J. Jones who may have never been on the witness stand. It's what the person is actually saying and how the jury perceives that witness whether a police officer or a lay witness and whether or not the juror says, because this is a police officer, he is going to tell me the truth quicker and I should give more credibility to what he says than a lay witness?

A No.

Q You would not do that?

A No. I do know that a police officer—what I was trying to say before is, a police officer is going to seem more credible in my opinion and reliable because he has had more experience in doing this kind of stuff than somebody like me gets called to the witness stand. Nervous as all get-out.

Q Well, don't be nervous. Nobody is going to bother you.

A I know, but I can't help it.

Q We would get in trouble with the **[4596]** Judge and I don't want to get in trouble with the Judge any more.

You say seem credible. Would you explain—in other words, you said that a police officer would seen more credible?

A Well, he's going to be calm, composed, accurate, know exactly how to answer questions, you know, to answer yes or no or elaborate or whatever. Whereas the other person, this may be the first time he would be on the stand or something and he would be a little nervous or not come off as well as a police officer. That's what I meant. I do believe a police officer would tell the truth, but I believe other people will, too.

Q Say a police officer testifies and the citizen accused testifies. Would you give more credibility to the police officer —

A No.

Q —because he would seem more credible because of what you say is his experience and all that?

A No—you know, I can't really say that for sure. If there was a policeman up here in uniform and then some bum came in with **[4597]** a tee shirt and barefoot and something like that and just mumbled and didn't answer the questions correctly then yes, I would be prejudiced towards the policeman—and their stories conflicted, so it would depend.

Q And a step beyond that, the reason that you would believe the police officer or believe he was more credible is because of that uniform he had on and this fellow over here had on a tee shirt and no shoes?

A Yeah, right. Well, not as much as the way—well, I was pointing out the way he was dressed as just not respecting the court. But mumbling and not answering questions—you know what I'm trying to say?

Q Yes, ma'am.

A It's kind of human nature to feel that way.

Q The Judge is indicating that I'm not going to get my extra time so I've got to speed up. In a capital murder case, the jurors first of all have to find the accused—in a capital murder case, the jurors either answer one or four questions. The first question is whether or not the accused is guilty beyond a **[4598]** reasonable doubt. If they answer that no, then

that's the end of it. Everybody goes home. If they answer yes, he is guilty beyond a reasonable doubt, then they either get those two or those three questions. Without going into those three questions—and everyone will probably tell you, number two is the key question. In other words, because usually the jury can say with respect to number one, from what they get in the first part of the trial, that it was deliberate and that's yes, so let's move on to what the key question is, number two. Is there a probability that he is going to commit criminal acts of violence that would constitute a continuing threat to society. I believe you indicated to Mr. Macaluso that you would want to know whether or not the defendant would commit crimes that would be a menace to society; is that correct?

A Yes.

Q By that you mean whether or not he would commit murder, rape, assault to human beings?

A Well, I kind of think what I was meaning is, is the defendant a person that **[4599]** keeps repeating the—doing awful acts to society.

Q With respect to where you said if a person—I think you had said where a person commits murder for the first time, you would not give him the death penalty?

A No—well, no, I wouldn't.

Q Except in one isolated instance that you referred to?

A Right.

Q If you found a person guilty beyond a reasonable doubt of capital murder and you were back there answering the—trying to answer question number two and the evidence had shown you that person had no criminal record, you have no past history. All you have is what you heard in the first part of the trial. Could you answer question number two?

A Well, I would say no, but I would answer it.

THE COURT: You would answer it no?

A Wait.

THE COURT: I just want to know what your answer was.

[4600] A I would answer it no.

Q You would answer it no?

A Yes—the key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society?

Q In other words, you're saying —and I don't want to put words in your mouth—that a person with no prior history cannot be a continuing threat to society?

A I don't think so.

Q In question number thirty-seven you were asked "Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony?" You answered yes. Is it for or against?

A I would say both for and against according to the situation. I think that sometimes people bring in a psychiatrist or a psychologist to tell the jury and—well, anyone in the courtroom that this person is mentally incompetent when in actuality they're not and then it works the other way, too. I don't put much store in that.

Q Are you saying you don't put too **[4601]** much store in the testimony of a psychiatrist or a psychologist?

A Yes.

Q Are you saying you would—would you give less credibility to the testimony of a psychiatrist simply because he is a psychiatrist testifying either one way or the other?

A Yes, sir, I would.

Q And you would you give less credibility to the testimony of a psychologist simply because he is a psychologist than any other person?

A Yes. Is the difference between them one gives drugs and one doesn't?

Q I haven't the slightest idea. Mr. West tells me that one is able to prescribe drugs and one is not. I'm not going to ask him which one. Whatever he is, if a psychiatrist got on the stand, you are not going to look at him in the same way you would someone else?

A I really don't think so.

Q With respect to fifty-three you indicated that you had served on a jury and was there anything in your prior jury experience **[4602]** that either upset or agitated to the extent that such jury service was an unsatisfactory experience? You said yes.

A This was absolutely ridiculous. I sat on a civil case from 8:00 until 4:30. The Judge made us go out and —it was a lawsuit—we came back in and he said, "'This is ridiculous. I don't know why I've kept you here all day. I'll dismiss this case. Neither side has evidence." We sat there all day on that. Yes, that was—

Q Because of that experience in that case would that affect you if chosen as a juror in this case?

A No.

Q A couple of other areas I need to talk with you about. One is the lesser and included offense of capital murder which is murder. The range of punishment is not less than five nor more than ninety-nine, life and/or a $10,.000.00 fine. We're not using the example that you used. This is where the accused had been found guilty beyond a reasonable doubt and you believe from the facts and circumstances of this murder case that the **[4603]** proper punishment for the knowingly and intentional taking of the person's life without any legal justification or any legal excuse, the proper punishment is five years, could you consider and vote for five years?

A Yes, sir.

Q When you came in on Monday and you saw us sitting here, did it—could you tell me what went through your mind?

A Well, I was confused and wanting to know all the facts. That's really what I was sitting there wondering.

Q Did you wonder which one was the Defendant?

A At first until the Judge told us.

Q Did you say to yourself what did he do before the Judge told you?

A Yes.

Q Some people believe where a person is—in other words, you walk in, you see him sitting there and the first thing you say is I wonder what he did. Did you presume that he is innocent as he sat there or did you believe that he must have done something because otherwise he wouldn't be sitting there?

[4604] A I didn't have any thoughts either way on that.

Q Can you presume that Mr. Miller-El is innocent as he sits there right now?

A Yes.

Q And would you-continue that presumption until the State proves, if it can, beyond a reasonable doubt that he is guilty of something, if they can?

A Well, as I said before, that's America.

Q That's a what?

A That's America. That's our way. You would have to think that way. I have a flag in my purse, if you want me to wave it.

Q John Wayne, Jesse Jackson, apple pie?

A Right.

Q Mother, father, FBI, Hoover, right, and not necessarily in that order?

A Right.

Q And the Republican Party?

A Right.

Q Young Republican?

A Yes.

[4605] THE COURT: And old Republican.

A You know, there is—I was asked earlier if there was anything that would influence me. There is something that would influence me as you pointed out a while ago. If I was the only person causing a hung jury—is that expression still used?

Q Yes.

A That would probably sway me.

Q The law anticipates that there are twelve people that comprise the jury. However, there are twelve individual jurors that the jurors will listen to the evidence, hear the Court's charge, the argument of counsel, and go back in the jury room and deliberate with the jurors about the proper punishment and at some point they will make up in their individual mind what the proper punishment is based upon the law and the evidence and that they render that regardless for which side, but they render that individually based upon the law and the evidence that they had heard in the case. If they sincerely believe that this was the proper verdict, that they would do that and that they **[4606]** would not change their minds simply because the other eleven believe one way.

You're saying if you were a juror and the other eleven over there said, no, it's this way, then you would give in?

A After deliberation, I probably would, yes. I don't think if everybody felt that way so strongly and I was the only person, then after deliberation in which cases are pointed out and things are reviewed then, yes, I probably could be swayed easily.

Q The jurors are not going to have any cases pointed out to them. The Judge -

A After reviews of what was presented in court is what I meant.

Q The State and the accused is entitled to have a juror that says, once I make up my mind, I'm going to render that decision and I'm not going to give in simply—based upon the law and the facts and the evidence that they heard.

They, having heard the facts, the evidence, considered it, deliberated, make up their mind what the proper decision is based upon those facts and once they do that, that they render that verdict. I get the **[4607]** impression —

MR. NELSON: Judge, excuse me. The law—I believe what Mr. Cunningham is saying is incorrect. The law contemplates that the jurors would deliberate, not make up their minds, fold their hands and sit in the corner and say that's it. They're always under a duty to deliberate, listen to what the other jurors have to say, discuss things.

MR. WEST: Your Honor, I'm going to object and ask that Counsel make a legal objection.

THE COURT: Reask the question. Without ruling on the objection, reask the question.

MS. HEARN: Your Honor, may I ask a question right quick?

THE COURT: I guess so.

MS. HEARN: Do all the juries—does it have to be a unanimous decision on a trial? Isn't that right?

[4608] THE COURT: I can answer that, I believe. In order for a verdict to be returned, there must be a unanimous verdict. Now—

MR. CUNNINGHAM: Except in an instance sometimes with respect to those two—

THE COURT: I'm going to qualify that. In a capital murder case, as regards to the answers to one and two and three if given, our statutes provide that at least ten people must vote no before it can be answered no. In other words, you can have two not vote. It doesn't have to be a unanimous no verdict, but all twelve jurors must vote some way. Does my answer to your question make sense?

MS. HEARN: Yes.

THE COURT: So when you ask does it have to be unanimous, in capital murder case—and this is the only exception to the rule—**[4609]** well, in civil cases—the only exception to the rule in criminal cases, every one of twelve jurors must participate in the verdict. At the guilt or innocence phase of the case, it must be unanimous, all twelve people have to vote the same way. If the defendant is found guilty of capital murder, then at the punishment phase it may be ten to two for a no. It must be all twelve for yes, but all twelve people one way or the other have to vote one way or the other. In other words, there can't be one juror that says I'm not going to vote yes or no. Does that answer your question?

MS HEARN: Yes.

Q With the Judge's explanation, was that your answer that you would give in?

A Very strongly possible if I were the only one. If there were eleven one way and I was the other way, after the deliberation.

Q I'm trying to see if that is a **[4610]** definite, yes, I would give in, if the other eleven said one thing and you believed something else after deliberating, you would give in?

A I would have to feel very strongly not to give in.

Q I think we need to know whether you would or you wouldn't.

A Then I would. If I have to make a choice, then I would.

Q You would give in?

A Yes.

MR. CUNNINGHAM: Your Honor, we will submit the juror.

THE COURT: On that last ground or anything else?

MR. CUNNINGHAM: About five of them, I believe.

THE COURT: Ms. Hearn, let me ask you to go out in the hall.

(Whereupon, Ms. Hearn left the courtroom, after which there was an off the record discussion, following which Ms. Hearn returned to the **[4611]** courtroom and the following proceedings were held.)

THE COURT: Ms. Hearn, that was a little longer than I anticipated, but I had to get into some matters.

Ms. Hearn, I'm going to spend a few minutes with you and go over some of the answers you gave to both lawyers really and make sure that I understand your feelings and answers as best I can. I want to take as much time as necessary, but it's late in the day and late in the week. We've been at this for five weeks, so the time we spend, I think is important.

There are a couple of observations that I want to make in that regard and I've done this with some other jurors in the same situation. They are these, as the lawyers have already told you: No one expects anyone to come down **[4612]** here to serve on jury duty and give up the way you feel about things, opinions about the law or how you feel about certain things. That's fine. The law expects citizens to be that way. We would be disappointed if people were not that way.

However, the other side of that situation is, if you get on a jury, if you're accepted on a jury, this jury or any other jury, the law requires that you take an oath that I give you as the Judge in this particular case at least and that oath says that you will a true verdict render according to the law and the evidence in the case. It merely says that you will follow the instructions I give you and the law that applies generally in the case and you will base whatever verdict you reach on the evidence in the case and not just a part of the law or not make **[4613]** up law on your own and not base a decision, if you do base one, on facts that aren't in the case. In other words, how you feel or prejudice or bias or something like that. It's a very simple oath and it's sometimes difficult to apply because, as I said, we all have feelings about the law that we may or may not agree with. I'm sure the lawyers, if they were given a chance to and I could too, could tell you areas of the law that we don't agree with. We think it's just not a good law. I would assume that these lawyers, like I do, follow the law even though they might not agree with it because that is the law. The place to change the

law if you don't like it is down in Austin and not up here in the courtroom or the jury room.

With that starting out point—in other words, you're **[4614]** entitled to feel the way you do, but if the way you feel would prevent you from following the law and the instructions in this case, then you're not a qualified juror. If you can put aside those feelings long enough to serve as a juror in this case and follow the law and the evidence, then you're qualified.

There were three areas that I made notes of that at least I had questions about. If you're to be sworn by me as a juror in this case, you've got to be able to take this oath that you will follow the law and you will base your verdict on the law. Let's talk about question number two first. I think that was the first area that I noted a question in my mind. Here is the law on the thing.

If the State of Texas proves beyond a reasonable doubt that a **[4615]** defendant is guilty of the offense of capital murder as they've alleged and you as a juror had found a defendant guilty of that, then at the punishment phase of the case, after all the evidence, if any, is presented to the jury, I'll instruct the jury then to go out and answer these questions, one, two and three, if the evidence raises three—but one and two are the critical questions as these lawyers pointed out. I will instruct the jury that in order for the jury to answer those questions yes, which would result in the death penalty being imposed, that jury, the twelve of them, must believe beyond a reasonable doubt that those answers ought to be yes. As I explained a moment or two ago, however if they fail to prove that beyond a reasonable doubt, of course, the answer ought to be no. **[4616]** I don't think you had a question about that.

In fact, I've heard it said and I'm willing to say this. I don't think it is an incorrect statement of law. I think you can assume, if you get that far, that is the punishment phase of a capital murder case, that the answers to one and two start out at no, if you will, in your mind, because if you answer it no or ten of you answer it no, the law requires that I

sentence the defendant to a life sentence. I haven't got any option at all. It's either death or life depending on how you answer those questions. I don't think it is unfair to either side to say that, if you want to put it that way, he starts out—you have to start out answering those no and then make the State bring you evidence somewhere in that case that **[4617]** convinces you beyond a reasonable doubt that they ought to be answered yes and, if they do that, then you answer them yes and the result follows.

Now, you said—and I heard it one way and maybe you said it another way and maybe the lawyers heard it still a third and fourth way. I understood you once to say that for a first offender, you couldn't assess the death penalty. I think you said words to that effect.

MS. HEARN: Right.

THE COURT: Let me put that belief of yours aside. That's fine and I'm not quarreling with you. However, in a capital murder case, if you have found a defendant guilty of capital murder, the law permits these things to occur. This is the evidence that the jury would be allowed to base its answers to one **[4618]** and two on. It may of course consider the evidence in the first phase of the case that it heard when it found the defendant guilty of capital murder to start with which is—you've heard it explained several ways - knowingly or intentionally causing the death of another individual in the course of committing another felony, so you found the defendant guilty of murder plus an attempted commission or a commission of another felony.

Now, in a capital murder case there is a punishment hearing following the guilt or innocence phase of the case just as there is in any criminal case in Texas. A burglary case has a punishment hearing. A DWI case has a punishment hearing. They all have punishment hearings. At that punishment hearing, both sides are entitled to bring **[4619]** additional evidence before the jury to help them answer these questions. Neither side has any responsibility to do so and particularly the defendant doesn't have to do anything at all, if he doesn't want to. He may or he may not, but he

doesn't have to bring anything and the State does not either. I can't tell you at this point in time whether or not you will hear any additional evidence.

If you did not hear any additional evidence or based on what you heard could you take the oath that if you had found a defendant guilty beyond a reasonable doubt and you went out and deliberated on one and two, if the evidence to number two showed you beyond a reasonable doubt that it ought to be answered yes from everything you had heard in the case, could you answer it yes?

MS. HEARN: Yes, if the **[4620]** State proved that he would be a continuing threat to society.

THE COURT: Now, you mentioned a word and I want to point this out and, if the lawyers want to object, they can. I think it is a correct statement of law. Number two deals with more than the future, what is going to happen in the future as opposed to what is happening today or what has happened in the past. As Mr. Cunningham pointed out, number one—I won't say it could be answered on the facts you heard in the first part of the case, but a lot of times the facts are pretty closely related about whether somebody did something deliberately and with the reasonable expectation that it would cause the death of another person. That first part of the case a lot of times has a lot of facts that bears on that, but **[4621]** that's not your problem.

Number two, I will tell you that there may or may not have been evidence at the first phase of the case that will help you answer number two and there may be additional evidence in the punishment phase. Are you saying that you could answer number two yes or no depending on what the evidence in the case had been and you won't automatically close out either answer; is that a fair statement?

MS. HEARN: Right.

THE COURT: Another question I had—or again it's more one that you raised than I raised. Both Mr. Cunningham and Mr. Macaluso spent some moments with you about how you would view the testimony of certain kinds of wit-

nesses. I think lawyers spent some time with you because of your background about how you would **[4622]** judge police testimony and I think you finally said that you wouldn't give them a head start, that is a police officer a head start, even over the defendant if he chose to testify. You would judge them initially at the credibility stage the same; is that—I understood you correctly in that regard?

MS. HEARN: Yes.

THE COURT: Now, you mentioned or you told Mr. Cunningham with regards to the testimony of a psychiatrist or a psychologist—and this was in reference to one of your answers on the questionnaire—that you did not have apparently a very good opinion of their kind of testimony; is that a fair statement?

MS. HEARN: Yes.

THE COURT: All right. I'm not sure I could even ask this **[4623]** question to get the answer from you that I think you want to give, but let me say this as regards to psychiatrist or psychologists just like the lawyers did about police officers. Every witness regardless of who he or she is starts out at the same point. That is, they start out, as Mr. Macaluso said, as it were in a race, even. Because of one reason or another, you used some good examples of a person—how they look on the witness stand as opposed to how another witness looks. That's legitimate. You can judge a witness—you know, you want to see if they're—you know, what their perspective was, their experience in the area about which they're testifying, how they stand up under cross-examination. All of these are factors that you as a juror could take into consideration. In that regard, **[4624]** applying that to a psychiatrist, are you saying that you could not believe the testimony of a psychiatrist?

MS. HEARN: No. But any evidence that a psychiatrist or a psychologist gave, I would like to be factual and not—I would just [sic] their testimony on the facts and not just what he supposes from his study of the mind and the sociology of human nature.

THE COURT: Well, let me submit this to you. Sometimes doctors, psychiatrists or psychologists include just like any kind of expert—offer opinions about things and they may or may not be qualified to do so, but assuming they did, the law provides that under certain circumstances certain people can offer a jury opinions about things and the jury doesn't have to believe them, but the law entitles **[4625]** the particular witness—for example, in an intersection collision case in a civil court, the parties are allowed to call witnesses who can testify based on the skid marks, how fast the car was going and such as that. Police officers, for example, often are qualified in that area because they've been trained. Now, that's an expert witness.

A juror in a criminal case can consider the testimony of anybody if they want to. Are you saying, if a doctor was called in this case to testify, a psychiatrist or a psychologist, and he testified about some opinion fact that you couldn't accept that and couldn't believe it or are you just saying you would be awful careful before you did believe it?

MS. HEARN: That's according to what it is. Why I mainly **[4626]** object to the psychiatrist is, so many things can be done by faking a test by a person, you know, the ink spot. People fake what they see in that. Or through drugs even, the mental stability of someone can be affected under someone else's control so much and that's what I was thinking of when I answered that question. Like the skid marks that you were pointing out, if the situation applied under a psychiatrist's area as an expert from what findings have found in the past, then yes I could take him as a credible witness.

THE COURT: Well, assuming in a hypothetical situation that a psychiatrist or a psychologist testified and gave an opinion. Are you saying that you could accept that if you believed that his opinion was a valid opinion?

MS. HEARN: Yes.

[4627] THE COURT: You're not saying you wouldn't believe it under any circumstances then?

MS. HEARN: I would believe that he is telling the truth to the best of his ability. However, there are just some things that can't be proven.

THE COURT: For example?

MS. HEARN: Well, like someone faking a test to prove that they are mentally incompetent.

THE COURT: Do you believe the doctor can't tell that a person is faking or not faking?

MS. HEARN: I've never thought of that.

THE COURT: I'm asking you what you mean. What do you mean?

MS. HEARN: I think sometimes—just like people can fake passing a lie detection test, I think sometimes no, we can't tell.

[4628] THE COURT: You think even a doctor couldn't properly evaluate a person, even a psychiatrist?

MS. HEARN: Right.

THE COURT: Well, again I'm asking this question. Would you still listen to the testimony of a psychiatrist or a psychologist and decide whether or not to believe that witness for whatever reason?

MS. HEARN: Yes.

THE COURT: And if you believe whatever he testified to, that it was believable and credible, could you base a verdict in a case on it if you believed it?

MS. HEARN: I don't know. If it came down to what the psychiatrist said, I would just have to hear what the evidence was.

THE COURT: In other words, if a psychiatrist — we're not talking about this case. We're **[4629]** talking about a case. The questionnaire is a very broad questionnaire. It covers about six different questions. If a psychiatrist was called as a witness in a case and you heard his testimony about an issue in the case and he was cross-examined and you believed after hearing whatever it was he said that his

testimony was believable and could be given some weight, could you do that?

MS. HEARN: Yes.

THE COURT: Likewise, for whatever reason as long as it was a reasonable standard that you applied—do you understand what I'm saying?

MS. HEARN: Right.

THE COURT: Okay. I'm going to assume that Ms. Hearn is sitting as a juror in this case, if you're sworn as a juror in this case—and this is going to go **[4630]** into the next area I want to talk to you about. All the lawyers assume that you're a reasonable person. You have a right to be critical of the testimony, to be hypercritical, if you want to be, of the testimony as long at some point in time you are reasonable about how you judge things.

I think you've said, and I don't want to put words in your mouth. I'm a lawyer just like these other lawyers. These are very good lawyers. No one has tried to trick you or get you to say something I don't think you want to say and I haven't tried to, I hope. What you're saying is, you would apply your adult common sense to judge the testimony of any witness and, if you believe that witness beyond a reasonable doubt, you will base a verdict on that witness testimony and, if you didn't, you just **[4631]** wouldn't do it; is that—

MS. HEARN: Exactly.

THE COURT: You wouldn't automatically then disregard the testimony of a psychiatrist or a psychologist just because of their profession?

MS. HEARN: No, but like you said—no, I would believe him, but then there is only so much you can put as factual evidence of the study of the mind. Do you know what I'm trying to say?

THE COURT: Well, at a point in time are you saying it becomes opinion or because you can't grasp a mind like you can a broken bone?

MS. HEARN: Right. I mean, I would listen, but there are just some things—I don't know how to explain it. Do you know where I'm coming from? I would be [sic] believe him, but yet there are just some things that a psychiatrist cannot enter into evidence as fact.

[4632] THE COURT: Obviously at a point what any doctor or any expert is going to say is going to be opinion, so what I'm saying is that's mostly what they testify to, is opinion. If they weren't doctors, police officers, meteorologists, FFA controllers, they're never at the scene of whatever it was that happened. They come in months later and say based on facts which are in evidence in my experience and training, I'm now able to give an opinion about something based on known facts. Opinion is not necessarily a fact. It is merely that. It's merely an opinion, but are you saying that you would take the facts that you based his opinion on and, if you believed his opinion was valid, you could accept it and, if you didn't, you wouldn't; is that what —

MS. HEARN: Exactly, yes. I **[4633]** wish I could have said it like that.

THE COURT: Now, finally and maybe most importantly—we're really serious about what we're doing. I think that's clear because you've been sitting in that box for about two hours now. Mr. Cunningham asked you about your feelings about participating as one of the twelve jurors and how you would perform as a juror. Let me start out by saying that we all appreciate the fact—none of us, first of all, have ever been on juries. I don't think any of these lawyers have. I know I have never been on a jury and I doubt that I will ever be on one. It's unlikely that these lawyers will ever be on one.

But be that as it may, we don't know what goes on in a jury room other than what jurors tell us later on, but we do know that **[4634]** the law requires when a jury goes out to deliberate in any case whether it be a capital murder case or a fight over a boundary line in a real estate situation, the law requires and I would instruct you, if you wrote me out a note saying, Judge, we can't agree, to go back into that jury room,

the twelve of you behind those locked doors and continue to discuss the evidence, continue to debate the evidence and argue about it if necessary and not surrender your own personal reasonable beliefs about it and to try to reach a verdict. That's the instruction I give a jury if and when they send a note out saying that they're not quite in agreement. The law then requires you, Ms. Hearn, if you're sworn as a juror in this case and you get on this case—and both sides are entitled to know that you will do **[4635]** this, not just the defendant. The State is entitled to know it also. If you're in there and you believe, for example, that the State has not proved its case beyond a reasonable doubt at the first phase of the case and you're the only juror that believes that way and the other eleven think that he is guilty as sin, but Ms. Hearn thinks they have just not satisfied in my mind beyond a reasonable doubt, here's what the law requires you to do.

The law requires you to ask yourself at that point, am I being reasonable in my belief? Am I conducting myself, as it were, in a reasonable manner? Am I looking at the evidence reasonably? Let the other eleven jurors argue for a while, if you want to, and try to convince you that you're wrong and they're right.

What the Defendant is **[4636]** entitled to know and what the State is entitled to know at that point in time, if you after all that still believe, no, by gosh, I just don't believe the State has proved its case beyond a reasonable doubt or I don't believe they proved one of the two ought to be yes, you will continue to vote the way that your heart and your mind tells you to vote and not let those other eleven people browbeat you or coerce you into a verdict that is against your understanding or belief of the evidence and the law.

Back to what we talked about ten minutes ago, you take an oath to follow the law and the evidence in the case and, if the law and the evidence in the case tells you at that point in time that the answer ought to be not guilty or no, then you will stick with it and yet still debate the case with **[4637]** your fellow jurors. Now, can you take an oath to do that or not?

MS. HEARN: Yes, I could. I would do that for a long, long time, but if it was a year from now and we're still deliberating—of course, I'm stretching it, and I was still the only one that thought the way I did, after talking and talking and talking and talking, then I would think it is eleven to one and so I would give in, but I would stick to my own opinion for a long time.

THE COURT: Are you saying you would give in just to get the case over with or are you saying you would give in because they convinced you that you were wrong?

MS. HEARN: They would convince me.

THE COURT: They would have to convince you to change your vote based on some reason and not just because, well, it's 12:00 **[4638]** o'clock and I want to go to lunch?

MS. HEARN: Right.

THE COURT: I can assure you that I'm not going to make a jury deliberate for a year, but I don't think that's the record. I'm not trying to be light about this because this really is an important question and in these kinds of cases, I'll be very honest—and I'm probably going beyond where the lawyers would like me to go, but this is a very serious case. It's a very important case. The State has told you, if they can get a guilty verdict in the first phase of the case, they're going to ask you to answer those questions in such a way that this man is going to be put to death.

This Defendant over there needs to sit there right now knowing that, if Ms. Hearn is the only one in there sitting there on **[4639]** his side because she believes that's the evidence, he's entitled to know that you're going to stick there until you're persuaded fairly otherwise or stick there until I discharge you. Can you tell me that you will do that?

MS. HEARN: Yes, I can do that, but I can also tell you I would do that for the State, too.

THE COURT: Sure. That goes both ways. I mean, if you're the only one for guilty and the other eleven are for not guilty, you will still [sic] there and hold out until they

persuade you to change your mind fairly. It cuts both ways. Everything in this case cuts both ways except that the State of Texas has the burden of proof and the Defendant doesn't. That doesn't change.

Ms. Hearn, let me ask you to go back out in the hall one more time. We've got to argue some **[4640]** law.

MR. CUNNINGHAM: May we approach the bench?

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the juror.)

THE COURT: You've been there for a long time and you've said a lot of things and I took notes and the lawyers took notes and I want to make sure that I heard everything the same way they did. I'm going to go back to one thing particularly. I think you said something different a few minutes later and that's why I didn't remember it.

You said somewhere along the way if a witness came in a tee shirt and barefooted and somebody else was nicely dressed or whatever that you would start them out differently. Then later on **[4641]** you said, as I recall, that you would not start anybody out differently. You would start them all out at the same point. What I simply want to ask you is—the law is, every witness getting on that witness stand starts out equal regardless of how they're dressed or how they look, what color they are, what profession they are, anything of that sort. It may be that after the first couple of questions that you're able to give one of them a big lead over the other one, but every witness has got to be started out right because it wouldn't be fair, I hope you would agree or tell me if you don't agree, to believe one witness because he was better dressed than the other witness because a poorly dressed person or a bum, for that matter, I would assume, could probably give accurate facts about something **[4642]** regardless of how he was dressed. Would you agree with me?

MS. HEARN: Yes. I was not meaning the dressing as much as I was the respect to the court like when he got up

here and after the testimony started, how he presented himself. I was talking about mumbling or evading the question or something like that.

THE COURT: Are you saying then, as a witness testifies or during the time a witness testifies, you as a juror would be looking at how the witness looked, how they answered questions, if you want to, how respectful they were to the lawyers in court or whether they were dropped [sic] their eyes or avoiding eye contact, in other words all of these things that you—you're probably judging me right now as I'm talking to you. I assume that you are on some basis—whether I'm **[4643]** telling the truth about stuff. You're entitled as a citizen juror particularly in judging the weight or the credibility of witness to apply any kind of reasonable standard you want to in judging their testimony. If you as a juror believe a witness who testifies in a mumbling manner or comes in here and doesn't show any respect for the jury, for the lawyers, for the Defendant or the Court, won't look up, doesn't answer the questions directly, all those things are things you can legitimately and honestly take into consideration in judging that witness' testimony after you've heard him testify. Is that what you're saying?

MS. HEARN: That's what I'm saying. When I was pointing out the dressing, I was meaning that incorporated with the testimony. It's a package.

[4644] THE COURT: I thought that's what you meant, but I wanted to be sure.

Now, one final area and I'm going to come back to this one more time because I want to make sure I understand. Questions number one and number two, I think it's not going out of school to say, if the defendant is found guilty are the crux of the whole case, particularly number two.

I think it's clear that if the defendant is found guilty of capital murder, the jury in the second phase of the case, the punishment phase of the case, may or may not hear more evidence. The law doesn't require each side to bring any evidence at the second phase of the case. The law provides, if all the evidence that a jury has heard is what they heard at the

first phase of the case, the jury can base a verdict **[4645]** on just that evidence without any additional evidence. You may hear some and you may not.

Now knowing what the law is, that neither side has to bring you any additional evidence in the second phase of the case, if you took an oath as a juror in this case and at the second phase of the case they didn't bring you any additional evidence, at the punishment phase, but you believed from the evidence beyond reasonable doubt that those answers ought to be answered yes to one and two, could you answer them yes?

MS. HEARN: Yes.

THE COURT: Likewise—and this is just as important and maybe more important—at the second phase of the case, if you hadn't heard any evidence from either side at the second phase of the case and you believed based on **[4646]** the evidence you had heard that one or two or both of those answers ought to be answered no, you can answer them no?

MS HEARN: Yes.

THE COURT: In other words, you wouldn't automatically answer them yes just because you didn't hear anything in the second phase or no just because you didn't hear anything in the second phase; is that fair?

MS. HEARN: Right.

THE COURT: The State has got the burden of proof. The burden never shifts. So you're saying that you would base whatever verdict you did get at either phase of the case on the evidence you heard and, if they didn't convince you beyond a reasonable doubt that those answers ought to be yes, yes, yes, you wouldn't answer yes, yes, yes; is that fair?

[4647] MS. HEARN: That's correct.

THE COURT: Let me ask you to step outside one more time and that will be it, believe it or not. The reason we're doing this is to take up law matters, Ms. Hearn. It isn't anything offensive against you.

(Whereupon, Ms. Hearn left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Cunningham, I'm going to hold that she is qualified. I hope I've covered all the bases, but I'm going to hold that she is qualified.

MR. CUNNINGHAM: Does the Court intend to—do I understand that the Court is now through qualifying the juror?

THE COURT: I'm through asking her questions regarding qualifications. Yes, I am. I hold that she is qualified, Mr. **[4648]** Cunningham.

MR. CUNNINGHAM: I will except to the Court's ruling. The juror told me when I was talking with her that, in the instance that she referred to where there was a young child burned and she realizing that the range of punishment was five years to ninety-nine or life, in that instance she would always give life and that she would never give five years. Based on that she is not qualified and we submit her for cause on that, too, and for the other reasons that we have previously submitted her. Back to the first one, she has not been qualified with respect to that.

Thirdly, she stated—well, she volunteered, if a police officer testified—no, I would give more credibility to the police officer than a person that walked in with a tee shirt and **[4649]** something and she stated her reason why. We would therefore submit that Ms. Hearn is not qualified and we submit her.

THE COURT: Mr. Cunningham, I'm going to respectfully decline to agree with you. I think that she qualified herself ultimately on the full range of punishment even though she unfortunately—I say unfortunately because that was an unfortunate case. We're all aware of it. I don't think it disqualifies her in this case because she qualified on the full range.

As regards to the police officer versus the bum off the streets, I think she qualified herself on her ability to give everybody's testimony the same credibility initially. She

cleared up a while ago, I believe, that she was only referring to that in reference to how she would **[4650]** maybe use that as some way to judge the weight to give a person's testimony. I respectfully decline to sustain those objections., I hold that she is still qualified.

MR. CUNNINGHAM: Note our exception. Your Honor, at this time we would renew on behalf of Thomas Joe Miller-El our motion for additional preemptory strikes for the reasons stated in the motion for preemptory strikes.

MR. NELSON: Our position is the same as it has been since the discussion of these. We feel like the Court's rulings have been clearly correct and have clearly been based on the law and on the prior case decision. There is no necessity to grant the defense an extra preemptory strike and they have no right to an extra preemptory strike.

MR. CUNNINGHAM: In **[4651]** response, I would resurge the reasons stated in the motion for preemptory strikes. Two, would offer in evidence all of the testimony from the prospective jurors six, twenty-one, twenty-four, seventy-nine, eighty-two, one hundred three, either by Mr. West or by myself in support of the motion of preemptory strikes.

THE COURT: Mr. Cunningham, I realize that it's a very important case to you and your client. However, I'm certainly going to stand corrected if the Court of Criminal Appeals should disagree with me on my judgment, but I believe the way we've conducted voir dire in this case throughout has been to, I hope, be very lenient in allowing the parties to even agree to excuse some jurors if one side or the other felt it was acceptable provided it was done with the **[4652]** agreement of the Defendant with the hope that we would talk only to those people that could be qualified one way or the other. I do not believe that I have forced the Defendant to use a strike on anyone who is not qualified. I'm going to respectfully decline again to grant your motion for extra strikes.

MR. CUNNINGHAM: Note our exception, Your Honor, and, in anticipation of what the State is going to do, would

advise the Court that as of prospective juror number one hundred seven, Max Wayne O'Dell, the Defendant Thomas Joe Miller-El no longer has any preemptory strikes and that he has exhausted all of his preemptory strikes and that jurors numbers six, twenty-one, twenty-four, seventy-nine, eighty-two, eighty-five and one hundred three are objectionable to him as the **[4653]** Defendant and that they have been struck and except for having to use preemptory challenges on prospective jurors six, Darol L. Weigant, prospective juror twenty-one, Sandra L. Jenkins, prospective juror twenty-four, Gwendolyn M. Smile, prospective juror number seventy-nine, Louis G. Wolters, prospective juror number eighty-two, Cheryl Ann Davis, prospective juror number eighty-five, Gary D. Spence and prospective juror number one hundred three, Russell L. Jones, they should have been removed for cause.

THE COURT: Again, I'll note that, but let the Court typically have the last word, Mr. Cunningham. Go ahead. I'm sorry.

MR. CUNNINGHAM: And also the Defendant Thomas Joe Miller-El would also object to the seating of Sandra R. Hearn as a **[4654]** prospective juror in this case and being prospective juror number twelve in this case and that she is objectionable to him for the reasons previously stated when they urged her for dismissal for cause and all of the reasons previously stated to the Court.

THE COURT: One final matter. I'm going to, of course, note your objections and, secondly, let the record reflect that regarding that last juror, I didn't cut you off even though I signaled you. You were allowed forty minutes to question her, which the State had something like thirty-two, which is not a lot more time, but because it was at a point in time where you were out of strikes, I wanted you to feel as free to talk extra as you could. I'm not going to give you any more time. I think Ms. Hearn—

[4655] MR. CUNNINGHAM: I was getting ready to ask you.

THE COURT: Well, I'll decline to do that, too.

MR. CUNNINGHAM: So that the record will reflect that the Defendant Thomas Joe Miller-El respectfully urges the Court to allow him additional time as the result of the Judge having talked with Ms. Sandra Hearn in excess of about twenty-seven minutes.

THE COURT: I'm going to decline to do that.

MR. CUNNINGHAM: Note our exception, Your Honor.

THE COURT: Let's bring her in and see what the State has decided to do.

(Whereupon, Ms. Hearn returned to the courtroom and the following proceedings were held.)

THE COURT: Ms. Hearn, back here one more time and I promise **[4656]** you this is the last time you will have to sit there.

MS. HEARN: That's all right. I'm really enjoying this.

THE COURT: We all are a little bit punchy and tired. I want to say this before I do anything else. These are very good lawyers and very professional and believe it or not, we've maintained a very good friendship. We're all friendly and we all like each other, I think. I'll pass that on to you for whatever it's worth.

Mr. Macaluso, what says the State?

MR. MACALUSO: May it please the Court: Ms. Hearn, we would be pleased to accept you as a juror on this case.

MR. CUNNINGHAM: I will renew all of the previous objections, the previous motion, and we reurge them again. We **[4657]** reurge all of those.

THE COURT: I have all of those in mind, Mr. Cunningham.

THE COURT: And consider them as if they were stated right now.

THE COURT: I have all of those in mind in detail, in great detail, and my ruling will be the same.

Ms. Hearn, you have been accepted or will be accepted as a juror in this case and I'm going to give you the oath that we talked about momentarily.

Before that, let me say this to you: We're all worn out and you may be, too, but it's very important that I tell you a few things. First of all, you've been qualified under the law to serve as a juror in this case, which means that both sides, both of these sets of lawyers and that Defendant particularly and me, **[4658]** because I've got to insure that this all happens, believe if you're sworn as a juror in this case, which I'm getting ready to do, you will follow that law that we spent all this time talking about. They have a right to rely on your answers as you gave them to me and you gave to these lawyers, that you won't change your mind in the jury room, if you said you would do something today, you will do it a week or two weeks from now if necessary. We believe that or you wouldn't be accepted as a juror in this case.

The other thing is, you can see the great deal of time it took to talk to you. You are the twelfth juror. We now have a jury in this case. I'm going to give you some instructions regarding that momentarily. I want to impress again on you the importance you have to this case **[4659]** and are important to this case. Now, after you're sworn I'm going to give you the instructions that I gave on Monday in a very general way, but most importantly I'm really going to give them to you strongly now because you're a very outgoing person and you're a very interesting person and I know that the temptation is going to be great when you go back to work tomorrow in University Park—because we're probably not going to start this case, as far as you're concerned before about Wednesday of next week. It's going to be very hard out there tomorrow when you're signing a purchase order or something for the chief or one of those detectives out there if somebody says something about this case.

I want to instruct you most specifically not to discuss this case with anyone including—I **[4660]** don't care who it is—your boy friend, or whoever and not let anybody give you any kind of input about this case or what you ought to do in the case because, again, Ms. Hearn, these lawyers, the Defendant and I am entitled to know that you're going to base whatever verdict you finally participate in this case on the

evidence you get from the witness stand there and exhibits, whatever that might be, the law that I give you and nothing else. It would be really unfair to the State or to the Defendant and to your fellow jurors if you let somebody tell you what you ought to do and went for it. I don't think you will. I just wanted to impress that on you because the situation in which you work is a little different than a lot of other jurors. You're around people all day who are in police work, firefighters. **[4661]** The City Hall is sort of small, everything considered, and a lot of you-all tend to see each other all the time. So will you promise me that you will honor that instruction?

MS. HEARN: Yes, sir.

THE COURT: Let me ask you to raise your hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: Before you get away, I may be able to tell you when to come back. Let me see the lawyers, please.

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the juror.)

(Whereupon, the voir dire proceedings in this cause were concluded.)

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